UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CHICAGO AND MIDWEST REGIONAL JOINT BOARD, WORKERS UNITED/SEIU, **Charging Party,** **v.** **STARBUCKS CORPORATION,** **Respondent.**	**Case Nos. 14-CA-290968** **14-CA-291278** **14-CA-291665** **14-CA-291958** **14-CA-292529** **14-CA-293122** **14-CA-293404** **14-CA-295106** **14-CA-295350** **Deputy Chief Administrative Law Judge Arthur J. Amchan**

POST-HEARING BRIEF ON BEHALF OF STARBUCKS CORPORATION

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I. INTRODUCTION

Respondent Starbucks Corporation ("Starbucks") respectfully requests the Administrative Law Judge dismiss the Third Consolidated Complaint ("Complaint"), which is based upon charges filed by the Chicago and Midwest Regional Joint Board, Workers United/SEIU ("Union"). General Counsel failed to present sufficient evidence at the hearing to carry her burden of proof on any of the allegations in the Complaint. Accordingly, Starbucks requests dismissal of the Complaint in its entirety.

II. STATEMENT OF THE CASE

On February 2, 2022,[1] the Union filed a petition for representation election seeking to represent all full time and regular part-time hourly Baristas and Shift Supervisors employed by Starbucks at its store located at 10201 W. 75th Street, Overland Park, Kansas (the "75th Street store") (14-RC-289926). (GC Ex. 35).

On February 24, in Case 14-RC-289926, Starbucks executed its first Stipulated Election Agreement ("Election Agreement") with the Union nationally, obviating the need for a hearing and moving the parties expeditiously to an election. (Joint Ex. 1). The next day, February 25, Regional Director of NLRB Region 14, Andrea J. Wilkes, approved the Election Agreement. (Joint Ex. 1). The Election Agreement marked a turning point for Starbucks, the Union, and the NLRB as it paved the way for reducing the NLRB's backlog and more quickly advancing hundreds of subsequent Starbucks election petitions across the country so Starbucks partners could cast votes and have their voices heard with respect to whether they want to unionize.

[1] All dates occur in 2022 unless otherwise noted.

The Election Agreement called for a mail-ballot only election for a specifically defined and agreed upon bargaining unit, and provided, in relevant part:

> **4. ELECTION.** The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, SubRegion 17, by close of business 4:45 p.m. on **Wednesday, March 16, 2022**. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region office by close of business 4:45 p.m. on **Wednesday, April 6, 2022**. The mail ballots will be counted at the SubRegional office located at 8600 S Farley St., Overland Park, KS at 2:00 p.m. on **Friday, April 8, 2022**. A meeting invitation for the videoconference will be sent to counsel for the parties prior to the count. No party may make a video or audio recording or save any image of the count.
>
> Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be void.
>
> If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region office by no later than 4:45 p.m. on **Wednesday, March 23, 2022**, in order to arrange for another mail ballot kit to be sent to that employee.
>
> If the election and/or count is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.

(Joint Ex. 1) (emphasis in original). The Election Agreement also contained the following agreed upon language defining the eligible voters:

> **5. UNIT AND ELIGIBLE VOTERS.** The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:
>
> > **Included**: All full-time and regular part-time hourly Baristas and Shift Supervisors employed at 10201 W 75th St, Overland Park, KS 66204 (Store 20346 - often referred to as "75th and I35").
> >
> > **Excluded**: All Store Managers, office clerical employees, professional employees, guards, and supervisors as defined by the Act, and all other employees.
>
> Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending February 20, 2022**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. In a mail ballot election, employees are eligible to vote

> if they are in the above unit on both the payroll period ending date and on the date they mail in their ballots to the Board's designated office.
>
> Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls or by mail as described above in paragraph 4.
>
> Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, and, in a mail ballot election, before they mail in their ballots to the Board's designated office, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

(Joint Ex. 1) (emphasis in original).

"***Ordinarily***, a charging party's own alleged misconduct is . . . not a defense to a respondent's unfair labor practices." ALJ Bench Book § 3-810. However, alleged charging party misconduct ***is relevant*** to the remedy. *Id.* (citing *Laura Modes Co.*, 144 NLRB 1592, 1596 (1963); *Allou Distributors*, 201 NLRB 47, 47–48 (1973) (union misconduct warranted withholding the normal bargaining order and instead directing an election)). It follows that discussing the Union's misconduct is appropriate.

Despite Starbucks' positive intentions in entering an election stipulation for the first time nationally in this case, several alarming and unprecedented problems arose in connection with the conduct of the election, both before the count and during the tally itself, prompting Starbucks to file ***seventeen*** objections to the election on April 15.

As explained *infra*, Starbucks has been repeatedly denied the opportunity to consolidate, or transfer and consolidate, its pending Objections in 14-RC-289926 with this proceeding. (See

Resp. Exs. 84, 85, and 86). Starbucks' Motion to Disqualify Region 14 as counsel for the General Counsel in the instant proceeding was similarly denied. These decisions are a gross denial of due process and a miscarriage of justice because Region 14, through this proceeding and otherwise, continues to interfere with the NLRB's investigations into the Region's misconduct by opposing Starbucks' motions to consolidate proceedings and intentionally delaying Starbucks' hearing on its Objections. Region 14 seeks to moot Starbucks' Objections by obtaining a bargaining order in this case. Indeed, at this time, the hearing on Starbucks' Objections is in abeyance pending a ruling by General Counsel on a simple motion seeking, among other things, documents and witnesses from Region 14 in accordance with Starbucks subpoenas, which has now gone undecided for many weeks. Starbucks has no doubt General Counsel is awaiting a decision in this case in the hope that it can deny Starbucks its statutory right to a full and fair hearing on its Objections, which will expose the manifest inappropriate conduct that occurred between Region 14 personnel and Union representatives during this election.

Region 29's Regional Office conducted the initial investigation of those Objections. On May 11, during the pendency of the investigation, an Order Consolidating Cases, Consolidating Complaint, and Notice of Hearing issued for one unfair labor practice case involving the Plaza Store and five unfair labor practice cases involving the 75th Street store:

- 14-CA-290968, which was filed by the Union on February 22, with a first amended charge filed on March 24, and a second amended charge filed on May 6;
- 14-CA-291278, which was filed by the Union on February 25, with a first amended charge filed on April 7, 2022, a second amended charge filed on April 21, and a third amended charge filed on April 25;
- 14-CA-291958, which was filed by the Union on March 9, with a first amended charge filed on March 24, and a second amended charge filed on May 5;

- 14-CA-292529, which was filed by the Union on March 18, and an amended charge filed on May 5;
- 14-CA-293122, which was filed by the Union on March 29, and an amended charge filed on April 29; and
- 14-CA-293404, which was filed by the Union on April 4, and an amended charge filed on April 29.

Pursuant to that Order, a hearing was scheduled for July 5.

On June 6, a Second Order Consolidating Cases, Consolidating Complaint, and Notice of Hearing ("Second Consolidated Complaint") issued adding one unfair labor practice case involving the Lawrence Store and one additional unfair labor practice case involving the 75th Street store, including:

- 14-CA-295106, which was filed by the Union on May 3, with a first amended charge filed on May 31, and a second amended charge filed on June 1; and
- 14-CA-295350, which was filed by the Union on May 6, and an amended charge filed on June 1.

Pursuant to that Order, the hearing on the Second Consolidated Complaint remained scheduled for July.

On June 10, Region 29's Regional Director issued a Report on the Objections and Notice of Hearing after finding Starbucks had raised material and substantial issues of fact in ***thirteen separate objections*** to the election, including its objections alleging collusion between Region 14 personnel and Union representatives to secretly convert the parties' stipulated mail ballot election into a mixed mail ballot and manual election, which Union representatives and Region 14 personnel deliberately concealed from Starbucks. The hearing on these Objections was originally set to begin on July 5 in Region 29, the same day as the scheduled hearing for the instant unfair labor practice cases.

On June 16, the Union filed a Motion to Postpone the Objections Hearing for 14-RC-289926 in Region 29. On June 17, Starbucks filed its Motion to Oppose Postponing the Objections Hearing. That same day, Starbucks filed its Request to Postpone the July 5 ALJ Hearing on the Second Consolidated Complaint. On June 21, Counsel for the General Counsel filed a Brief in Opposition to Starbucks's Request to Postpone the Hearing, as did the Union.

That same day, on June 21, a Third Order Consolidating Cases, Consolidating Complaint, and Notice of Hearing ("Complaint") issued adding one more unfair labor practice case involving the 75th Street store:

- 14-CA-291665, which was filed by the Union on March 4, and an amended charge filed on June 8.

Pursuant to that Order, the hearing on the Complaint remained scheduled for July 5, making Starbucks' Answer to the additional allegations contained within it due *after* the hearing was set to begin. Notably, the Complaint added a refusal to bargain allegation and requested bargaining order relief under both the *Gissel* doctrine and the long extinct *Joy Silk* doctrine. Such belated addition of such substantial allegations deprived Starbucks of adequate notice and opportunity to respond fully. Moreover, the bargaining order was sought for the very same election for which Region 29 found substantial and material issues of fact lodged by Starbucks necessitating a hearing on thirteen separate objections to the conduct of that election.

On June 23, the Administrative Law Judge assigned to the Complaint denied Starbucks's Request to Postpone the Hearing.

Understandably, given the eleventh-hour addition of a refusal to bargain charge and bargaining order remedies sought in the Complaint, Starbucks sought to consolidate its Objections hearing in Case 14-RC-289926 with the unfair labor practice proceeding. Interestingly, the

NLRB's Rules and Regulations makes several procedural mechanisms available to accomplish that objective, no doubt to promote efficiency. Therefore, Starbucks first filed virtually identical, but separate, Motions to Consolidate with the Region 14 and Region 29 Regional Directors pursuant to Sections 102.33 and 102.69. (Resp. Ex. 84). *See* NLRB Rules and Regulations §§ 102.33, 102.69. In its Motion filed with Region 14, Starbucks asked the Regional Director of Region 14 to consolidate its pending unfair labor practice cases in Region 14 with the pending objections case in Region 29. (Resp. Ex. 84). Conversely, in its Motion filed with Region 29, Starbucks asked Region 29 to consolidate its pending objections case with the unfair labor practice cases in Region 14. (Resp. Ex. 84).

On June 29, the Regional Director for Region 29 denied Starbucks's Motion to Consolidate the objections involving election misconduct with the other unfair labor practice cases pending in Region 14. Region 29 believed it lacked the authority to consolidate the unfair labor practices pending before Region 14 with the objections before it, and Region 29 refused to transfer the objections to Region 14 as that region could not oversee objections involving its own misconduct. (Resp. Ex. 85). Based on Region 29's well-reasoned denial, Region 14 should have recognized the appropriate action was to grant the identical motion pending before it in accordance with the Regional Director of Region 14's separate, but equally valid, authority under Sections 102.33 and 102.69 of the NLRB's Rules and Regulations to consolidate its cases with the pending objections case in Region 29. *See* NLRB Rules and Regulations §§ 102.33, 102.69. However, rather than do so, Region 14 ignored the motion entirely and never issued a ruling on it. Accordingly, ALJ Amchan should have heard the consolidated unfair labor practice and objection proceeding with Region 29 presiding.

Therefore, on June 30, Starbucks filed another motion (Resp. Ex. 86) asking the General Counsel to exercise her powers pursuant to Sections 102.33 and 102.72 to accomplish what Region 14's Regional Director refused to do, i.e., transfer all the unfair labor practice cases to Region 29 and consolidate them with the objections hearing in 14-RC-289926, maintaining all such matters before Administrative Law Judge Amchan. *See* NLRB Rules and Regulations §§ 102.33, 102.72. Additionally, given Region 14's role in repeatedly interfering with Starbucks's statutory right to a full and fair hearing with respect to Region 14's misconduct in the election, Starbucks asked the General Counsel to order prosecution of the case by counsel from Region 29. Section 102.72(a)(3) ***requires*** the General Counsel to grant such motions "[w]henever it appears ***necessary to effectuate the purpose of the Act, or to avoid unnecessary costs or delay***." NLRB Rules and Regulations § 102.73(a)(3) (emphasis added).

Remarkably, General Counsel ignored this motion, and the representation and unfair labor practice cases moved forward separately. At the outset of this hearing, Starbucks renewed its motion seeking to stay the proceedings until a ruling issued on its motions to consolidate proceedings. Its requests to stay were denied. The hearing proceeded. Starbucks renewed its requests again throughout the hearing, all of which were again denied.

These "pocket veto" denials prevented Starbucks from fully developing the issue of whether a bargaining order is possible in view of the misconduct of the Union and Region 14. General Counsel and Regional Directors for Regions 14 and 29 seem committed to ensuring the misconduct which took place between the Union and Region 14 personnel never fully comes to light. As noted above, the objections hearing has been in suspense, and remains so, since August 24, 2022. General Counsel appears to be awaiting a favorable decision on its bargaining order remedy requested in this case so the Board can declare Starbucks' objections "moot" without ever

affording Starbucks access to the mountain of evidence in Region 14's possession revealing the heinous misconduct of Region 14 and the Union. Testimony in the objections hearing has confirmed the bona fides of several of the objections concerning collusion between the Union and Region 14 personnel, and a tenured agency employee whistleblower has likewise confirmed the existence of the misconduct alleged in Starbucks's objections to the election. The failure of General Counsel of this historically independent and well-respected federal agency to address this situation impartially and fairly, shirking the statutory mandate and oath of fairness and neutrality, is unprecedented and shocking.

In this unfair labor practice case, some of Counsel for General Counsel's witnesses provided incredible testimony, riddled with inaccuracies and—in some instances—outright lies. There is no credible evidence establishing the basis for any of the alleged unfair labor practices, much less any credible evidence justifying a bargaining order in this case. Therefore, Starbucks respectfully requests dismissal of the allegations in their entirety.

III. FACTUAL ISSUES PRESENTED

After a full and complete hearing, the following key factual issues from this proceeding require resolution:

- Was Heather Neal a Section 2(11) supervisor or Section 2(13) agent of the Employer at all material times in these cases?
- Did Starbucks District Manager Sara Jenkins ("Jenkins") solicit grievances and promise to remedy them at the 75th Street store on January 29, 2022?
- Did Jenkins coerce employees by telling them they "stabbed her in the back by naming her in a letter publicly announcing employees' union support" on February 2 at the 75th Street store?
- Did Jenkins coerce employees during a "job counseling" by "linking poor work performance being counseled to employees' union activities" on February 2 at the 75th Street store?

- Did Starbucks Store Manager Drake Bellis ("Bellis") instruct employees at the 75th Street store to enforce the dress code more strictly in response to employees' union activities and/or support in early February 2022?

- Did Bellis threaten employees of the 75th Street store with stricter enforcement of company policies because of their union activities and/or support on (a) unknown dates in early February at the 75th Street store; (b) February 14 at the 75th Street store; (c) February 15 at the Shawnee Mission and Quivira store; or on (d) February 16 at the Shawnee Mission and Quivira store?

- Did Bellis coerce employees of the 75th Street store by "introducing anti-union discussions during Partner Development Conversations" ("PDCs"), "mandatory meetings that are normally reserved for evaluations and career planning," on (a) unknown dates in early February at the 75th Street store; (b) February 15 at the 87th Street store; (c) February 15 at the 87th Street store; (d) February 16 at the 87th Street store?

- Did Bellis threaten employees with loss of previously announced wage increases if employees selected the Union as their bargaining representative on (a) unknown dates in early February at the 5th Street store; (b) February 14 at the 75th Street store; (c) February 15 at the 87th Street store; and on (d) February 15 at the 87th Street store?

- Did Bellis threaten employees with staffing shortages if they selected the Union as their bargaining representative on (a) unknown dates in early February at the 75th Street store; (b) February 14 at the 75th Street store; and on (c) February 23 via telephone?

- Did Jenkins threaten employees with the loss of previously announced wage increases if employees selected the Union as their bargaining representative on February 15 at the 75th Street store?

- Did Jenkins coerce employees by inviting employees to resign on February 15 at the 75th Street store if they supported the Union in response to employees' union activities and/or support?

- Did Bellis threaten employees with an inability to transfer or change shifts if employees selected the Union as their bargaining representative on February 15 at the 87th Street store?

- Did Bellis threaten employees with a loss of previously scheduled wage increases if employees selected the Union as their bargaining representative on February 15 at the 87th Street store?

- Did Bellis threaten employees with a loss of promotional opportunities if employees selected the Union as their bargaining representative on February 15 at the 87th Street store?

- Did Bellis threaten employees with the loss of health benefits if employees selected the

Union as their bargaining representative on February 15 at the 87th Street store?

- Did Bellis threaten employees with loss of promotion opportunities because of their union activities and/or support on February 16 at the Shawnee Mission and Quivira store?

- Did Bellis interrogate employees about their union membership, activities, and sympathies by asking what the Union was promising employees on February 16 at the Shawnee Mission and Quivira store?

- Did Bellis, by telling employees contract negotiations can take over 400 days, inform employees that it would be futile for them to select the Union as their bargaining representative on February 16 at the Shawnee Mission and Quivira store?

- Did Bellis prohibit employees from discussing discipline on February 16 at the Shawnee Mission and Quivira store?

- Did Bellis threaten employees with a loss of ability to transfer if employees selected the Union as their bargaining representative on an unknown date between mid and late February 2022 via telephone?

- Did Bellis coerce employees by encouraging employees to quit and apply at other non-union Respondent stores to receive a previously scheduled wage increase and to keep their existing health benefits on an unknown date between mid and late February 2022 via telephone?

- Did Store Manager Eric Schmidt ("Schmidt") threaten employees with stricter enforcement of the dress code because they engaged in union activity on February 22 at the Country Club Plaza store?

- Did District Manager Ellie Grose ("Grose") threaten employees with a loss of future wage increases or benefits if employees selected the Union as their bargaining representative on February 23 at the Country Club Plaza store?

- Did Bellis threaten employees with the loss of previously scheduled wage increases if employees selected the Union as their bargaining representative on February 23 via telephone?

- Did Bellis threaten employees with the loss of an existing benefit by telling employees that managers could not assist employees on the floor if employees selected the Union as their bargaining representative on February 23 via telephone?

- Did Bellis threaten employees with staffing shortages if employees selected the Union as their bargaining representative on February 23 via telephone?

- Did Jenkins order employees engaged in Section 7 activity to cease that activity and leave hotel property on March 3 at the Overland Park Courtyard Marriott hotel?

- Did Jenkins request hotel management call the police on employees engaged in Section 7 activity on March 3 at the Overland Park Courtyard Marriott hotel?

- Did Bellis prohibit employees from recording a meeting conducted by Starbucks on March 3 at the Overland Park Courtyard Marriott hotel?

- Did Bellis by "stating most current employees will not be working for [Starbucks] when a collective-bargaining agreement is agreed upon," inform its employees that it would be futile for them to select the Union as their bargaining representative on March 3 at the Overland Park Courtyard Marriott hotel?

- Did Jenkins prohibit employees "from recording conversations under [Starbucks]'s no recording policy on March 11 at (a) Starbucks's Shawnee Mission and Quivira store; and (b) Starbucks's 75th Street store"?

- Did Store Manager Victoria Wolf ("Wolf") "prohibit[ ] employees from talking about unions or union organizing while permitting employees to talk about other non-work related subjects" on April 29 at the Lawrence store?

- Did Jenkins threaten employees with unspecified reprisal if they declined to listen to employer speech concerning employee exercise of Section 7 rights on February 2 at the 75th Street store?

- Did Bellis threaten employees with unspecified reprisal if they declined to listen to employer speech concerning employee exercise of Section 7 rights on an unknown date in early February at the 75th Street store?

- Did Bellis threaten employees with unspecified reprisal if they declined to listen to employer speech concerning employee exercise of Section 7 rights on February 15 at the 87th Street store?

- Did Bellis threaten employees with unspecified reprisal if they declined to listen to employer speech concerning employee exercise of Section 7 rights on February 15 at the Shawnee Mission and Quivira store?

- Did Bellis threaten employees with unspecified reprisal if they declined to listen to employer speech concerning employee exercise of Section 7 rights on February 16 at the Shawnee Mission and Quivira store?

- Did Jenkins and Bellis threaten employees with unspecified reprisal if they declined to listen to employer speech concerning employee exercise of Section 7 rights on March 3 at the Overland Park Courtyard Marriott?

- Did Starbucks more strictly enforce its policies "including, but not limited to, dress code, the wearing of pins/buttons, and filling out the courier log" since January 31 at the 75th Street store "because the employees of Respondent formed, joined, or assisted the Union

and engaged in concerted activities, and to discourage employees from engaging in these activities"?

- Did Starbucks grant benefits to partners by installing a storage pod, removing overstock of product from the store, and announcing plans to create additional parking "because employees of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities" in early February 2022 at the 75th Street store?

- Did Starbucks require Hannah McCown ("McCown") to increase her work availability or be demoted or resign "because the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities" on February 15?

- Did Starbucks issue a documented coaching to McCown "because the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities" on February 16?

- Did Starbucks more strictly enforce its dress code "because the employees of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities" since February 22 at its Country Club Plaza store?

- Did Starbucks issue a final written warning to McCown "because the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities" on March 11?

- Did Starbucks require Hannah Edwards ("Edwards") to increase her work availability or be demoted or resign "because the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities" on March 11?

- Did Starbucks reduce McCown's scheduled hours per week and fail to abide by scheduling commitments "because the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities" since about March 15?

- Did Starbucks issue a final written warning to Maddie Doran ("Doran") "because the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities" on March 26?

- Did Starbucks discharge Alydia Claypool ("Claypool") "because the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities" on March 28?

- Did Starbucks discharge Michael Vestigo ("Vestigo") "because the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities" on April 1?

- Did Starbucks discharge Doran "because the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities" on April 5?

- Did Starbucks constructively discharge McCown on April 12?

- Did Starbucks fail and refuse to bargain with the Union as the exclusive collective-bargaining representative of "the Unit" since about January 31?

- If any of the questions posed warrant the finding of an unfair labor practice, what, if any, remedies are appropriate under the circumstances?

IV. STATEMENT OF RELEVANT FACTS

A. Company Background

Starbucks operates over 9,000 retail locations across the United States. The Company's North American retail operations are divided into twelve regions. The Midwest Region includes stores in Kansas and Missouri, including the three stores at issue here. Midwest Regional Director Lewis Johnson currently oversees Area 68, which consists of 10 districts and between 100 and 120 retail stores. (Tr. 1163). Each district, in turn, consists of between ten and thirteen stores, comprised of roughly 300 partners overseen by a district manager. (Tr. 1165, 1177-78).

B. 75th Street Store Allegations

1. 75th Street Store Background Information

On February 2, 2022, the Union filed an RC petition seeking a bargaining unit of full-time and part-time baristas and shift supervisors in Store 20346 (the 75th Street store) located at 101201 W. 75th Street, Overland Park, Kansas. The RC Petition did not indicate the Union had made a request for recognition (Question 7a). (GC Ex. 36).

The 75th Street store is one of 12 within Starbucks' District 1063 and is constructed from two repurposed shipping containers. (Tr. 1168). The Store has walk up service and drive-thru service only. (Tr. 1168). The store does not have an indoor cafe. (Tr. 1168). The Store Manager is Jen Seymour, who reports to District 1063 District Manager Sara Jenkins. (Tr. 1210, 1213). Seymour became the Store Manager on March 7. (Tr. 1504). There are no allegations against Seymour in any of the charges in the Complaint. Drake Bellis dual-managed the Store along with his assigned home store from January 31 to March 7. (Tr. 1210, 1213).

2. Staffing Issues at the 75th Street Store Predated Any Union Activities

Uncontradicted record evidence shows the 75th Street store had experienced significant staffing issues long before any union activities at the store. (Tr. 1187). Uncontradicted evidence also established Jenkins spoke with Madison Leeper, formerly the store manager at the 75th Street store, on multiple occasions to coach her on ongoing issues with staffing before the Company became aware of union activity at the store. (Tr. 1187). In November 2021, Jenkins worked with Leeper to develop a plan to address the store's staffing needs by pairing her with mentors and requiring Leeper to send Jenkins weekly updates on the steps she was taking to close staffing and scheduling gaps at the 75th Street store. (Tr. 1188-89, 1191-92; Resp. Ex. 54, 67). Eventually, Jenkins issued Leeper a final written warning for, among other issues, her constant failure to staff and schedule the partners in the store adequately. (Resp. Ex. 62). The existence and content of Leeper's final written warning are also undisputed. The document itself indicates Leeper had not been following scheduling standards. (Tr. 1202; Resp. Ex. 62). Also uncontradicted is Jenkins's credible testimony concerning Leeper's inability to post schedules timely, her consistent understaffing of the 75th Street store for more than six months, and the absence of urgency in her seeking to address the store's staffing issues. (Tr. 1203). Leeper's final written warning also held

Leeper accountable for not scheduling per the business, meaning not hiring partners with sufficient availability to support the needs of the store. (Tr. 1203; Resp. Ex. 62). For example, Jenkins testified, if a day's peak begins at 7 a.m., partners should not be coming in at 8 a.m. and transitioning mid-peak as it causes chaos in the store. (Tr. 1203-04). All the events referenced immediately above in this paragraph are (a) uncontradicted and (b) took place prior to any union activities at the 75th Street store.

3. Parking at the 75th Street Store

The 75th Street store sits on a tight lot, confined on all sides by roads and businesses. (Tr. 1217, 1224; Resp. Ex. 63). It lies directly between a Taco Bell and a row of small businesses. (Tr. 1218-20; Resp. Ex. 63). For years, partners were allowed to park in the Taco Bell parking lot next door. (Tr. 1220). However, on July 12, 2021, former Store Manager Leeper emailed Jenkins and told her the General Manager of the neighboring Taco Bell had called the store and threatened to tow Starbucks partner and customer cars using its parking spaces. (Tr. 1224; Resp. Ex. 15). That same day, Jenkins replied, instructing Leeper to (1) reserve all the store's parking spots for openers and closers, prioritizing the safety of partners working at night, and (2) tell the rest of the partners working the daytime shifts to park in any of the open parking lots across the street. (Tr. 1224; Resp. Ex. 15). Critically, then, Jenkins <u>first</u> told Leeper to communicate the parking plan to the partners at the 75th Street store as early as <u>July of 2021</u>. (Tr. 1228).

A few months later, Leeper raised the parking issue again. (Tr. 1232-36; Resp. Exs. 45, 47). In mid-October, the parking issue arose again. (Tr. 1228-29). Leeper told Jenkins the partners did not want to park, or did not feel comfortable parking, across the street and walking to/from there. (Tr. 1229; Resp. Ex. 45). This prompted Jenkins to reach out to her boss at the time, Regional Director Amy Thompson, to see if they could obtain additional parking options for the partners at

the 75th Street store. (Tr. 1232-36; Resp. Ex. 45 at 3; Resp. Ex. 47 at 4-5). Thompson partnered with Dave Delach, in the Store Development Department, and Facilities Service Manager Doug Bayer to discuss possible solutions, including trying to lease spots from the Taco Bell. (Tr. 1230-31; Resp. Exs. 45 at 2, 47 at 4). Delach forwarded the request to Daniel Sheehan and Yuka Freeman, partners in Starbucks' Real Estate Team in Seattle, the same day. (Tr. 1232-36; Resp. Exs. 45 at 2, 47 at 4).

On November 10, 2021, Jenkins followed up with Thompson and Bayer again as Leeper had complained to Jenkins that parking at the store continuing to be a problem. (Tr. 1232-34; Resp. Ex. 46 at 1, 3). The same day, Thompson followed up with Delach to see if leasing spots from Taco Bell would be feasible. (Tr. 1232-36; Resp. Ex. 46 at 1, 3; Resp. Ex. 47 at 3). Both in October and November, Jenkins made sure to forward all the emails about the parking options to Leeper so she could communicate with the partners in her store to let them know management was working on those issues. (Tr. 1232-34; Resp. Ex. 46 at 3).

The next day, November 11, 2021, Delach asked Bayer and Sheehan to contact the Taco Bell to propose Starbucks lease its parking spots. (Tr. 1235-36; Resp. Ex. 47 at 2). Sheehan added Katherine Lofthus, another partner in the Real Estate group, to oversee the request and move the project forward. (Tr. 1235-36; Resp. Ex. 47 at 2). The same day, Leeper promised Jenkins she would connect with her partners no later than November 16, 2021, about the parking situation. (Resp. Ex. 48 at 1).

On November 12, 2021, Lofthus scheduled a virtual meeting with the local leadership team for the following week to discuss the cost limits, number of parking spaces, partner safety concerns, the Taco Bell proposed lease, and alternative parking arrangements. (Tr. 1235-36; Resp. 47 at 1). The virtual meeting took place on November 17, 2021; Bayer, Thompson, Lofthus, and

Jenkins attended, with each attendee taking responsibility for various action items. (Tr. 1235-36; Resp. Ex. 47 at 1). Following the November 17 meeting, Jenkins spoke to some of the daytime partners, including Hannah Edwards, at the store about parking at Big Bob's Furniture ("Bob's") to prevent them from having to cross any streets on their way to work. (Tr. 1237-39; Resp. Ex. 53 at 2).

On November 30, 2021, Jenkins contacted Lofthus again and inquired into the status of the Taco Bell parking spots. (Tr. 1237-40; Resp. Ex. 49 at 2; Resp. Ex. 53 at 2). A few days later, Lofthus replied, "No luck on the Taco Bell front so far." (Tr. 1237-40; Resp. Ex. 49 at 1-2; Resp. Ex. 53 at 1). Loftus explained no one at Taco Bell had returned her calls, and they had not been able to locate any email address to contact. (Tr. 1237-40; Resp. Ex. 49 at 1-2; Resp. Ex. 53 at 1).

On December 3, 2021, Jenkins responded to Loftus and proposed contacting Bob's about parking in its lot to give the daytime partners a choice between parking at Bob's or parking in the open parking lots across the street. (Tr. 1237-39; Resp. Ex. 53 at 1). On January 29, 2022, Jenkins contacted Loftus again to see if there had been any updates on either Taco Bell or Bob's since her previous email. (Tr. 1239-40; Resp. Ex. 49 at 1). On January 31, Jenkins forwarded her emails with Loftus to Bayer, one of the attendees on the November 17 parking solutions virtual meeting, looping her back into the discussions. On February 2, Bayer circulated his long-awaited Facilities Support Consultation Report for the 75th Street store, noting operations had asked him to visit the store to assess the parking situation. (Tr. 1241-43; Resp. Ex. 51 at 1). Bayer included diagrams he had prepared to accommodate a storage pod, acknowledging the partners' utilization of the space in front of the dumpsters as additional parking. (Tr. 1240-41; Resp. Ex. 52 at 1-2). Around the same time, in early February or March 2022, the parking spaces outside the 75th Street store were restriped. (Tr. 1588). Contrary to General Counsel's representations, the restriping did not add any

additional spaces, it simply outlined those existing spots partners and customers were utilizing already behind the dumpsters. (Tr. 1588).

4. Removal of Overstock and Storage Solutions at the 75th Street Store

For the 75th Street store, creating space for additional inventory has always posed unique challenges because of the building's space constraints. (Tr. 1172). Initially, the store was built to support projected sales of $20,000 to $25,000 a week. (Tr. 1170-72). As the store's sales volume grew, the need for more inventory did too. (Tr. 1172). In 2020, during Drake Bellis's previous tenure as Store Manager, Bellis and Jenkins worked together to add roughly 40 feet of storage by adding ten shelves, each four feet long. (Tr. 1180). They also added under-counter fridge storage for cold items. (Tr. 1181). During Leeper's tenure as Store Manager, Leeper and Jenkins added an option for a pastry cart and an under-counter pastry cart. (Tr. 1184-85). However, by the end of 2021, the 75th Street store was doing $40,000 to $45,000 in weekly sales. (Tr. 1186). The massive increase in sales created an even more acute need for storage solutions.

As early as March 2021, overstock and storage had become a problem again at the store. (Tr. 1243). Jenkins first noticed overstock beginning to pile up at the 75th Street store during her store visits in early 2021. (Tr. 1243). According to Jenkins, inventory organization is one of the biggest contributors to creating overstock issues in a store. (Tr. 1244). Starbucks uses various tools to determine how much backstock is needed for each item to best support the business. (Tr. 1244). If a store fails to place a specific order for certain necessary items timely, the system automatically orders those items. (Tr. 1245). This can cause inventory to pile up. (Tr. 1245). If a store has unremedied inventory organization issues, adding a storage pod can exacerbate the overstock issue. (Tr. 1244). For those reasons, before any store considers adding additional storage, the store must address any outstanding organization issues first. (Tr. 1244).

For the 75th Street store, Jenkins had paired Leeper with a mentor to help her organize the store's inventory. (Tr. 1245). On September 27, 2021, Leeper and Jenkins discussed a plan for obtaining additional storage for the store by ordering an outdoor storage pod. (Tr. 1245; Resp. Ex. 54). Following that discussion, Jenkins contacted Facilities Manager Doug Bayer and discussed a plan for removing the recycling bin to make room for a storage pod. (Tr. 1248; Resp. Ex. 56). On September 30, 2021, Bayer created a work task ticket so someone would contact Leeper and schedule removal of the recycling bin. (Tr. 1249-50; Resp. Ex. 56).

On October 7, 2021, Bayer followed up on the work task ticket. (Resp. Ex. 57). Initially, the Waste Management Team questioned removing the recycling bin, but after further emails with Jenkins, they eventually agreed to contact Leeper and facilitate the removal of the recycling bin. (Tr. 1251-52; Resp. Exs. 57, 59). Jenkins then forwarded the emails to Leeper on October 14, 2021, to let her know the status of the request to remove the recycling bin. (Tr. 1252; Resp. Ex. 57).

In the weeks that followed, Jenkins and Bayer both sent several more emails to the Waste Management Team asking about the status of the request to remove the recycling bin. (Resp. Exs. 58, 59). On November 8, 2021, the Waste Management Team emailed Jenkins and advised her they had been calling the 75th Street store to arrange removal of the recycling bin, but the line was consistently busy. (Tr. 1253; Resp. Ex. 58). Again, on November 9, 2021, they emailed Jenkins: "Just called them again. No answer." (Tr. 1253; Resp. Ex. 58).

With the holidays approaching and frustrated by Leeper's failure to take steps to permit removal of the recycling bin, Jenkins decided to leave the recycling bin and place the pod in one of the store's parking spots. (Tr. 1254-55; Resp. Ex. 59). On November 10, 2021, Jenkins instructed Leeper to order the storage pod and have it placed in the parking lot. (Tr. 1255; Resp.

Ex. 48). But, again, Leeper did nothing. (Tr. 1256). After the November 10, 2021, visit, Leeper promised to declutter and organize the store by November 21, 2021, in preparation for the storage pod's arrival. (Tr. 1199; Resp. Ex. 48). Then, again, after the November 16, 2021, visit, Leeper committed to ordering the storage pod by November 21, 2021, as well. (Tr. 1206-07, 1256; Resp. Ex. 55). During his testimony, former partner Calvin Culey confirmed he had stated in his Affidavit (page 15, lines 9 and 10): "Before Madison [Leeper] left she was trying to get a pod, but she was having issues so she just gave up." (Tr. 948). Culey further testified Leeper left the store some time in February 2022, before the store's partners went public with their Union campaign. (Tr. 948). This confirms, as does much of the record, that parking and storage were plainly issues before the partners went public with their organizational effort and Leeper failed to follow through on her commitments to the partners in the 75th Street store.

The storage and overstock issues persisted. In early February, Bayer raised the overstock and storage issues again in his Facilities Consultation Report. (Tr. 1256; Resp. Exs. 51, 52). On February 11, Bayer emailed Jenkins suggesting they order the storage pod to address the continuing overstock and storage issues at the 75th Street store temporarily. (Tr. 1256-57; Resp. Ex. 60). From there, Jenkins asked interim Store Managers Michelle Pearl and Amanda Pittman to assist Store Manager in Training Jen Seymour with the inventory organization issues Leeper had never addressed so they could declutter the store and prepare for the arrival of the storage pod. (Tr. 1257). The next day, February 12, Jenkins ordered the storage pod herself as the store was still between managers at that time. (Tr. 1257-58; Resp. Ex. 61). A few days later, February 16, the storage pod was delivered and placed in a parking spot. (Tr. 1258-59; Resp. Ex. 43).

5. January 29th Sara Jenkins Visit to the 75th Street Store

Jenkins's visit to the store on January 29 was no different than any other routine store visit. Jenkins, as a District Manager, has consistently maintained open channels of communication with partners in all her stores. (Tr. 1161). One way she does this is through her intentional store visits. (Tr. 1160, 1327). During such visits, Jenkins typically greets all the partners, including baristas and shift supervisors, asks them how their day is going, meets with the Store Manager, and before leaving asks partners, including baristas and shift supervisors, "what support they need or anything that they want to share with [her] at that time." (Tr. 1161). Jenkins did note the frequency or cadence of store visits changes occasionally depending upon the purpose of her visit and other factors such as whether the store has a full-time store manager at the time or not. (Tr. 1161; 1337-38).

Starbucks has always encouraged its partners to contact their leaders and share their concerns. (Resp. Ex. 72). Every Starbucks store has a "Navigating Your Concerns" poster containing contact information for the Store and District Managers, as well as information on how to contact the Partner Contact Center, the Partner Relations Teams, and the Ethics & Compliance Teams. (Resp. Ex. 72). The 75th Street store has a "Navigating Your Concerns" poster. (Tr. 1540-41; Resp. Ex. 72). Store Manager Jen Seymour confirmed the poster is maintained and routinely updated to reflect any changes within the management team. (Tr. 1541-42).

6. February 2nd Conversations with Hannah Edwards

Hannah Edwards testified that on February 2 Jenkins spoke with her at the 75th Street store, referred to the Union as "the elephant in the room," told her "[t]his doesn't have to be uncomfortable," and said Edwards "stabbed her in the back" (by sending the "Dear Kevin" letter announcing the partners' unionization effort). (Tr. 290). Jenkins denied telling Edwards she felt

stabbed in the back by the letter. (Tr. 1262; GC Ex. 5). In fact, Jenkins denied telling anyone she felt "stabbed in the back" by the Union's letter. (Tr. 1262). Rather, Jenkins testified she was understandably "a little upset" when she read the "Dear Kevin" letter because she had been working diligently for several months to address some of the issues about which the partners complained in the letter. (Tr. 1261; GC Ex. 5). But Jenkins further testified she did not let those emotions or the letter change the way she worked to meet the needs of her partners. (Tr. 1261). Jenkins said she did not do anything differently in how she managed the 75th Street store following the letter, nor did she treat the partners in that store any differently than she treated the rest of her non-petitioned stores. (Tr. 1262, 1263).

Edwards's testimony is not credible in several respects. For example, Edwards testified that during their February 2 conversation Jenkins stated, "the hospital workers down the street don't close when it snows outside, and Starbucks is one of those companies that doesn't close." (Tr. 290). Edwards claimed the statement was coercive because she understood the reference to the hospital to be "directly related to a portion of [their] Union letter." (Tr. 291). Yet, the letter makes no mention of any hospitals. (GC Ex. 5). Interestingly, despite prolifically recording hours of conversations during the campaign, the February 2 conversation is the only conversation Edwards had with Jenkins for which Edwards claims to have no recording. Indeed, the other recordings that she produced, including the recordings of her Partner Development Conversation with Drake Bellis on February 16 (addressed further below), directly contradict Edwards's testimony in several material respects and cast serious doubt on her credibility as a witness. In conjunction with numerous other inconsistencies in Edwards's testimony and the tape recordings, Jenkins's testimony should be credited over Edwards's testimony with respect to the events of February 2.

Notably, neither Jenkins, Edwards, nor any other witness testified to the existence of any statements made on February 2 during an alleged "job counseling" "linking the poor work performance being counseled to employees' union activities." Accordingly, General Counsel has not presented credible evidence supporting its allegation Starbucks made coercive statements on February 2 as alleged in Paragraphs 6(a) and (b) of the Complaint.

7. February 14th Shift Meeting for the 75th Street Store

On February 14, Bellis conducted a shift meeting with the shift supervisors at the 75th Street store. (Tr. 1449-50; GC Ex. 7). During that meeting, Bellis explained his expectations for adhering to policies and standards so everyone understood how he operates as a manager generally. (Tr. 1428-29).

McCown testified Bellis discussed various topics during the February 14 shift supervisor meeting including pins, dress code, window times, and being timely. (Tr. 68, 70). McCown also testified Bellis told the shift supervisors during the February 14 meeting "because of Madison's absence, that things were a little rough around the store and because of understaffing that they understood that, but that we needed to work toward the goal of being back on standard." (Tr. 71).

The testimony surrounding enforcement of the dress code at the 75th Street store is inconsistent. For example, Calvin Culey first testified Leeper had not enforced the dress code, then contradicted himself by stating Leeper often issued verbal reprimands regarding various dress code violations, saying things like "don't wear that[,]" or "[i]f I see you wear it again[,] I'll be mad." (Tr. 894). The reality is Starbucks consistently enforced its dress code's pin policy for years. That policy provides in relevant part:

Pins

Partners may only wear buttons or pins issued to the partner by Starbucks for

> special recognition or for advertising a Starbucks sponsored event or promotion; and one reasonably sized and placed button or pin that identifies a particular labor organization or a partner's support for that organization, except if it interferes with safety or threatens to harm customer relations or otherwise unreasonably interfere with Starbucks public image. Pins must be securely fastened. Partners are not permitted to wear buttons or pins that advocate a political, religious or personal issue.

(Resp. Ex. 6). The one-labor union pin policy has remained unchanged for more than ten years and has been upheld as lawful in the Second Circuit. *See NLRB v. Starbucks Corp.*, 679 F.3d 70 (2d Cir. 2012).

Calvin Culey testified Bellis's comments concerning his pins concerned non-labor related pins. (Tr. 895). Specifically, Culey testified Bellis asked him to stop wearing "a little gnome pin" and a smaller, circular pin with a pun and a picture of toast on it. (Tr. 895-96). No witness claimed Bellis asked them to remove any Union pins. According to Culey, Bellis addressed PDCs at the first shift meeting and advised he would conduct meetings because of the new Store Manager's arrival. (Tr. 883-84).

McCown also incredibly testified Bellis "had gone into talking about the Union," and "had talked about how he felt it wasn't right for the Company" during the February 14 Shift Meeting. (Tr. 66-67). McCown testified she asked Bellis at the February 14 shift meeting if the previously announced wage increases "was part of status quo" and Bellis allegedly told her "no and that we would be starting from zero while bargaining," and "it would hard to hire for our store if we were making less than the store next door." (Tr. 67). However, none of the other attendees at the February 14 Shift Supervisor Meeting (i.e., Bellis, Doran, Claypool, Culey) corroborated McCown's incredible testimony on this point.

8. February 15th Conversations with Hannah McCown

Starbucks expects its shift supervisors to maintain sufficient availability conducive to the needs of the business. (Tr. 1266; Resp. Ex. 7). Although store managers strive to balance partner availability with the business needs when creating schedules, Starbucks does not guarantee nor does it make any assurances "that hourly partners will receive their preferred hours or shifts, the same schedule each week, a minimum or maximum number of hours, or that a request for a schedule change will be approved." (Resp. Ex. 7). According to Jenkins, shift supervisors are expected to work a minimum of 28 hours a week and to be available for 34 hours during the week. (Tr. 1266). Likewise, shift supervisors should be available to work during "peak" times and not first arrive to work during the middle of "peak" business times. (Tr. 1266).

Regarding scheduling, all partners, including baristas and shift supervisors, are expected to maintain their availability in the scheduling system. (Resp. Exs. 7, 9). Store Managers, in turn, use that information to build schedules and should "[c]onsistently post schedules three weeks out" (Resp. Ex. 9 at 2). Store Managers also share responsibility for "[e]nsur[ing] partner availability is accurately reflected in the scheduling system" (Resp. Ex. 9 at 2).

Hannah McCown testified regarding a conversation between herself and Jenkins on February 15 during which McCown complained she felt management was retaliating against her because her hours had "essentially been cut in half for that time period." (Tr. 80). According to McCown, Jenkins then explained that if McCown wanted more hours, she would need to open her availability and input her expanded availability into the system. (Tr. 81). McCown testified she "first noticed it in the schedule for the week of February 14th[,]" and that prior to the week of February 14th, she had been working "approximately 35 hours a week." (Tr. 85, 86). She further

testified her February 14th schedule contained only 21 hours and continued to decline in hours from there. (Tr. 86).

General Counsel's Exhibit 46(a) directly contradicts McCown's testimony. (GC Ex. 46(a)). According to the time records, McCown first started working at the 75th Street store in early November 2021. (GC Ex. 46(a)).

Workweek	Hours Worked[2]
Week of 11/01/2021 to 11/07/2021	8.75
Week of 11/08/2021 to 11/14/2021	12
Week of 11/15/2021 to 11/21/2021	37.5
Week of 11/22/2021 to 11/28/2021	26.75
Week of 11/29/2021 to 12/05/2021	25.75
Week of 12/06/2021 to 12/12/2021	31
Week of 12/13/2021 to 12/19/2021	0
Week of 12/20/2021 to 12/26/2021	0
Week of 12/27/2021 to 01/02/2022	0
Week of 01/03/2022 to 01/09/2022	25.5
Week of 01/10/2022 to 01/16/2022	13.5
Week of 01/17/2022 to 01/23/2022	7.25
Week of 01/24/2022 to 01/30/2022	22.5
Week of 01/31/2022 to 02/06/2022	21.25
Week of 02/07/2022 to 02/13/2022	17.5
Week of 02/14/2022 to 02/20/2022	7

(*See* GC Ex. 46(a)). According to General Counsel's Exhibit 46(a), contrary to McCown's testimony, McCown worked on average between sixteen and seventeen hours a week prior to the week of February 14. Further, despite her being allegedly upset about only being scheduled for twenty-one hours, McCown only worked seven of those hours during the week of February 14. (GC Ex. 46(a)).

[2] This table was compiled using only the time record data admitted as General Counsel's Exhibit 46(a) for Hannah McCown for all shifts worked up to and including the week of February 14, 2022.

9. February 16th Hannah McCown Documented Coaching

At all relevant times, Starbucks has maintained and consistently enforced its lawful dress code policy. The Dress Code provides, in relevant part:

> **Footwear**
>
> Footwear should provide support, comfort and safety. Shoes in leather, faux leather, suede, rubber or similar waterproof materials must have closed toes and closed, flat heels, providing as much coverage to the top of the foot as possible. ***Shoes or boots must be within the color palette (except white) and may have a small amount of accent color***. Socks or hosiery are required. The same color and pattern guidelines for shirts and blouses must be followed subdued patterns and colors that complement the outfit and are not a distraction. While Starbucks does not require slip resistant shoes, the company strongly encourages partners to wear them to reduce the risk of fall injuries. Recommended brands of slip resistant shoes include: Skechers® Work, Keuka Cafe™, Kmart™ SafeTrax®, Dickies®, Lehigh® SlipGrips™, Shoes for Crews® and Wal Mart® TredSafe.

(Resp. Ex. 6; *see also* GC Ex. 44) (emphasis added). On February 15, McCown arrived at work wearing white tennis shoes. (Tr. 71-72, 75, 1449-50; GC Ex. 7). The rules surrounding the Starbucks color palette and shoe material were well known. (Tr. 73; GC Ex. 42). Calvin Culey, a fellow shift supervisor, testified Starbucks prohibits "soft top shoes," as opposed to plastic or leather, because they present a burn hazard. (Tr. 893).

Bellis testified he had just spent the prior day level setting his expectations surrounding dress code at the February 14 shift meeting with McCown and the other shift supervisors. (Tr. 1428-29; GC Ex. 7). Yet, the very next day, McCown arrived out of dress code. (Tr. 1449; GC Ex. 7). Given this dress code violation occurred the very next day after the discussions with Bellis surrounding Dress Code at the February 14 shift meeting, Bellis issued McCown a documented coaching (the lowest form of written discipline at Starbucks) for wearing white shoes on February 15 and delivered the corrective action on February 26, 2022. (Tr. 1449-50; GC Ex. 7).

McCown incredibly testified Culey was also out of dress code that day, but did not receive

any corrective action, claiming Culey arrived wearing "[m]ultiple rings, wearing jeans, and I believe a hoodie as well." (Tr. 83). Nothing in the record corroborates McCown's claims.

10. 75th Street Store's Partner Development Conversations

In early February 2022, Bellis posted a sign-up sheet in the 75th Street store inviting partners to schedule PDCs and encouraged partners to sign up for a timeslot. (Tr. 1427). Bellis confirmed the PDCs were not mandatory. (Tr. 1428). In fact, Bellis testified several partners never signed up for a PDC, including Josh Hall, Carlee Stoermann, Kelsey Stoermann, Bailey Charbonneau, Delia Twaddell, and perhaps others. (Tr. 1428). Bellis testified he left the door open if those partners decided they wanted to sign up for one later, but he did not discipline any of them for not signing up for a PDC. (Tr. 1428).

Culey testified the PDCs took place because of the new Store Managers (in Leeper's absence) and also testified his Affidavit (on page 6, lines 22 to 23) accurately set forth his recollection that "[a]t the Shift Supervisor meeting on January 31st or February 7th of 2022 Drake said that the PDCs were happening because we had new Store Managers." (Tr. 939-40). Additionally, Bellis testified he created an agenda to guide his discussions, and he planned to talk with the employees about his opinion on unions during their PDCs. (Tr. 1474; GC Ex. 49). Bellis also testified about the subject of unions, if somebody did not want to talk about unions during their PDCs, Bellis did not talk about unions. (Tr. 1483-84).

a. Hannah Edwards's PDC

Edwards described her PDC with Bellis at the Shawnee Mission store on February 16. (Tr. 294-97). "It started casually with some small talk since Drake and I knew each other from when I worked there before. He asked questions like how school is going, how's married life since I was a newlywed, and he told me a bit about his personal life as well, just kids are growing up, that

kinda thing." (Tr. 295). From there, Edwards testified, "He told me that with some of the partners he didn't already know he was using this as sort of a get-to-know you time. And he also told me that there would be some talk about enforcement of policies, reiterating how important it is that as a Shift I hold all the people on my shifts accountable for things like dress code, time and attendance, cell phone use, those sort of things that he knows I'm very aware of. So he covered that briefly with me." (Tr. 295). According to Edwards, "He then quickly moved into talking about the Union saying that he was not a, 'corporate spy,' and he didn't have any Overlords talking to him, you know, in one ear before he says things to us, saying that he's still the Drake I knew from when I worked with him before, and he didn't want it to be awkward or uncomfortable." (Tr. 295-96).

Edwards testified Bellis "shared his opinion about the Union and said there are things that he is supposed to say and isn't supposed to say, but he wanted to get his opinion out there so that I knew where he was coming from. And that he wanted things to be normal. And he talked about the Store Manager that he was training to take over our store. He said she would be a better fit than our previous Store Manager Madison [Leeper]. She is more mature. And I asked him some questions about this new manager's experience because that was important to me. Having been a Store Manager I wanted to know a little more about what she's bringing to the table." (Tr. 296).

Edwards further testified Bellis said "in his opinion, it wasn't a good fit for Starbucks to have a Union because Starbucks already takes such good care of us, and it would make things harder like communication with the Store Managers would be impeded." Edwards then testified what Bellis said "was negative towards the Union. Like he didn't say anything in support of it." (Tr. 296).

Lastly, Edwards testified they "also talked about the parking situation that day because before [her] PDC with him [she] worked a shift at the store and there was a storage pod placed in two parking spaces, two employee parking spaces, which took [their] designated spots from four down to two. And [she] was upset about that being the solution, as an example of why [she] felt the Union was important for [them] to explain the ins and outs of the store and what good solutions really look like." (Tr. 297).

The recordings Edwards made of her PDC in full (Joint Exhibits 3 and 4) contradict her testimony in several material respects. Edwards began her PDC by telling Bellis she had gotten a new job with a flower shop. (Joint Ex. 3 at 0:35). As a result, Edwards asked Bellis to update her availability in Partner Hours to reduce her Saturday availability from an 8-hour shift to a 5-hour shift. (Joint Ex. 3 at 1:24). Edwards said she did not know if her request would be approved because she knew some managers required Shift Supervisors to work as an opener or closer on a weekend day. (Joint Ex. 3 at 1:24). Bellis replied, "it depends on the needs of business." (Joint Ex. 3 at 1:24). Edwards explained she would rather arrive later in the morning and still leave by 1:30 p.m., but said if it was not possible, she would work the opening shift. (Joint Ex. 3 at 3:30). Edwards wanted to change her Saturday availability to 8:00 a.m. to 1:30 p.m. (Joint Ex. 3 at 5:05). Edwards acknowledged the adjustment she requested would reduce her hours to around 20.5 hours a week, far below the required hours expected for a Shift Supervisor. (Joint Ex. 3 at 7:30). Edwards also explained, in addition to school, she was juggling two jobs, and had thought about stepping down to barista already. (Joint Ex. 3 at 20:53). Clearly then, long before March 11, Edwards was already reducing her availability to hours below the minimum requirements for a Shift Supervisor and knew doing so would necessitate a demotion from Shift Supervisor to barista.

Critically, contrary to Edwards's testimony, Bellis did not quickly advance the discussion to matters of the Union. (Tr. 295-96). Instead, Bellis does not mention the Union until more than 20 minutes into the PDC – actually, 21:40 into the PDC as confirmed by Joint Exhibit 3—when he said:

> Have I shared my opinion on the union? -- Which I probably am not gonna do after these PDCs at all because I don't want to mess with it at all – uh -- I'm not trying to get you to talk about it -- I don't care what you have to say -- I mean I do -- like -- if you want to -- I -- I -- I -- my point is that -- I'm telling you the truth -- I've followed all this really closely I have reservations about expectations from everybody and what's reality -- my own thoughts on that -- makes me a little nervous -- its also a high turn over job -- I -- like I've seen a lot of turn over and it makes me wonder -- I mean I was here fourteen months ago and like three people are still here -- so I get worried that people that really need this -- that there will be a different majority then that have different views on it and so that's my thoughts on that.

(Joint Ex. 3 at 21:40). Following Bellis's remark, Edwards asked if she could share her own views on the Union. (Joint Ex. 3 at 23:40). Bellis did not interrogate her about her views. Bellis simply told her he understood her views were valid and said he was just listening. (Joint Ex. 3 at 24:00). Contrary to Edwards's testimony, Bellis did not say the Union "wasn't a good fit for Starbucks," nor did he say anything negative about the Union at all. (Tr. 296).

b. Michael Vestigo's PDC

Incoming Store Manager Seymour testified she attended Vestigo's PDC with Bellis. (Tr. 1511). Bellis introduced Seymour to Vestigo and then reviewed the Time and Attendance, Cell Phone Usage, and Dress Code policies. (Tr. 1528-29). Bellis then asked Vestigo questions about his training, if he felt he needed any more training, what his role was, if he was open to other roles, and if he wanted to grow into other positions. (Tr. 1529). Bellis next opened the floor for Vestigo to raise any questions or concerns he may have had at the time. (Tr. 1529). Seymour testified the PDC was roughly an hour long. (Tr. 1528). Seymour testified the Union was not discussed at all

during Vestigo's PDC. (Tr. 1529-30).

c. Hannah McCown's PDC

Hannah McCown testified her PDC occurred on February 16, the day after she spoke with Jenkins about her scheduling availability, at the Shawnee Mission and Quivira store and lasted only 20 minutes. (Tr. 91-92). McCown testified when the PDC occurred, she had already started applying for other jobs. McCown noted Bellis congratulated her on the new job opportunity and assured her it would not negatively impact her ability to get hours at the 75th Street store. (Tr. 97-98). According to McCown, Bellis "had told me about how he was having a bad day. He thought he had cancer in his finger. And then he went on to talk about books and podcasts. I believed them to be socialist books. He asked me if I had read them, and I told him no. And then also union podcasts, and he had asked if I had ever listened to them, and I said no." (Tr. 93). McCown claimed Bellis then "asked me about if I had ever listened to the union podcasts, he asked me what the Union was promising me." McCown testified she responded by telling Bellis "initially that I didn't want to talk about it, and he said, 'Oh, okay.' And then he went into a talk about Kroger . . . and how it took 400 days for negotiations and that it didn't work out well for them, and he didn't want to see that happen to us." (Tr. 93).

McCown also testified having told Bellis about her conversation with Jenkins regarding the promised raises and her availability. (Tr. 94). McCown claimed Bellis then told her in response to a question of whether she would be able to move up within the company claiming Bellis said, "probably not." (Tr. 95). McCown then claimed Bellis then delivered her documented coaching document during her PDC. (Tr. 95). However, the document itself shows it was not delivered until February 26. (GC Ex. 7). Additionally, McCown claims when Bellis delivered the document he allegedly told her "please do not make a big deal of this. I won't make a big deal about this, I won't

tell anybody, you don't have to tell anybody, we can leave this here." (Tr. 96).

Indeed, McCown's testimony seems wholly contrived. The recorded PDC conversation in evidence as Joint Exhibits 3 and 4, does not contain any threatening statements and Bellis comes across as supportive of the partners and friendly in how he approached all the topics at issue.

d. Calvin Culey's PDC

Seymour testified she attended Calvin Culey's PDC with Bellis. (Tr. 1511). During the PDC, Bellis introduced Seymour to Culley and reviewed the Time and Attendance, Cell Phone Usage, and Dress Code policies. (Tr. 1528-29). Bellis then asked Culey questions about their training, if they felt that they needed any more training, what their roles were, if they were open to other roles, and if they wanted to grow into other positions. (Tr. 1529). Bellis next opened the floor for Culey to raise any questions or concerns they may have had at the time. (Tr. 1529). Seymour testified the PDC was roughly an hour long. (Tr. 1528). Seymour testified Culey brought up the Union during his PDC, but they only discussed the subject for a couple minutes total. (Tr. 1529).

Culey testified although PDCs are supposed to be conducted at least twice a year, before his February PDC he had not had one since July 2021 (roughly 6 months earlier). (Tr. 882). Culey testified his PDC occurred shortly after Bellis came to the 75th Street store, with Bellis and Seymour both in attendance. (Tr. 883). The PDC took place outside of the 75th Street store. (Tr. 883). Culey said Seymour spoke very minimally during the PDC. (Tr. 884). Bellis started the PDC with Culey by asking about his prior PDC and what topics had been covered. (Tr. 884). Bellis discussed the three big things he thought were commonly missed in stores and the policies he expected to see enforced at the 75th Street store going forward: dress code, tardiness, and cleanliness. (Tr. 884-85). Culey then backtracked his testimony, claiming Bellis said he had seen those issues at other stores but not at the 75th Street store. (Tr. 885). Culey noted a few issues with

dress code he felt were not issues in the past, like the "wearing of buttons[,]" and remarked on some shoes and color choice "that had been okay in the past." (Tr. 885). Bellis discussed Culey's career progression into the role of an Assistant Store Manager or Store Manager and encouraged him to work on holding partners accountable, which was one of his existing job duties as a Shift Supervisor, to help him prepare for a promotion into a management role. (Tr. 942-45). They next discussed Leeper. (Tr. 885). Culey testified Leeper had been unkind to him and he had experienced issues with Leeper. (Tr. 886). Bellis expressed frustration about Leeper's leadership and said he felt like he had made progress with the 75th Street store during his previous stint in the store, which Leeper then negated by the way she poorly managed the store. (Tr. 886).

Culey testified Bellis brought up the Union "kind of abruptly." (Tr. 886). Culey testified Bellis said, "I don't want to ignore the elephant in the room." (Tr. 886). Culey said Bellis then said he supported unions, he liked unions, and his dad was in a union. (Tr. 886). According to Culey, Bellis then stated his opinion: "he didn't think [the Union] was right for Starbucks." (Tr. 886-87). Bellis felt a union would "get in the way of the partners and management," and Bellis felt Starbucks was a good company. (Tr. 886-87). Culey testified Bellis said they "had picked a horrible time to Unionize because . . . we weren't going to be getting the raises come summer because once we submitted a positive Union vote, if we voted—if everyone voted yes then we would enact the status quo, and that would make it really, really hard to hire for the store since everyone in the area—every Starbucks in the area would be paying more than ours would." (Tr. 887). Culey then testified after that "we switched off the Union stuff and started talking about what [Culey] wanted for [his] future with Starbucks and in general." (Tr. 887).

e. Maddie Doran's PDC

Doran's PDC took place at the 87th and Plum Street store. (Tr. 687). According to Doran, her PDC "began with Drake bringing up the Union." (Tr. 667). According to Doran, Bellis "said he was going to address the elephant in the room and he brought up the Union first in the PDC." (Tr. 667-68). Doran testified Bellis then "disclosed his political affiliation" and "said that he was a card carrying communist, to use his words, and that if -- you know, his job kind of put him at odds with the Union." (Tr. 668). Doran testified "[she] had been having concerns about not being—not feeling included in the Union, so that was when [she] brought up those concerns with [Bellis]." (Tr. 668).

Doran testified she also brought up promoting to ASM and concerns she had about. (Tr. 668). According to Doran, she brought up the subject of promoting to the ASM position first in her PDC because "[she] knew that promoting to ASM would put [her] at odds with the Union because the Union was specifically for partners and—or sorry, partners—baristas and Shift Supervisors—and if [she] were to promote to ASM, then it would . . . put [her] at odds with the Union" meaning "[she] wouldn't be able to participate in [the Union]." (Tr. 668). Doran testified Bellis confirmed promoting into a supervisory role would put her at odds with the Union. (Tr. 669). Doran said Bellis then "mentioned that promoting [her] to an ASM would be difficult to do, you know, under Union because, according to him, Unions promote based on like tenure, and so he wouldn't have much of a say or much of a decision as to whether [she] would be promoted or not." (Tr. 669). Additionally, Doran testified Bellis allegedly made statements saying it would be easier for him to promote another partner, Emma, from barista to a shift supervisor, than it would be to promote Doran to ASM. (Tr. 669). However, Doran's recollection of Bellis's statements made during the PDCs directly contradict the irrefutable evidence contained in Joint Exhibit 3, a

recording of one of Bellis's PDCs in which he can be heard commenting on how excited he is for all the untapped talent among the partners in the 75th Street store and their opportunities for promotion in the company. (Joint Ex. 3 at 14:21).

Doran also testified having initially asked Bellis about whether she could transfer out of the 75th Street store during her PDC to avoid "potentially losing my raise or losing my healthcare," or "being able to promote." (Tr. 674-75). Doran testified Bellis responded "he would have to ask like his higher-ups and see, you know, if it was possible." (Tr. 675).

Doran confusingly testified Bellis "mentioned that the nature of the store would change; that it would—yeah, that it would be—that stores that weren't Unionized would be considered like corporate stores, you know, part of like Starbucks corporate, and then stores that were Unionized would then be employee-owned and then would be considered licensed stores, I think was the verbiage he used." (Tr. 672-73).

Doran recalled bringing up the subject of wages during her PDC as well. (Tr. 669). Doran testified she brought up the subject of raises during her PDC because "people had been saying that the raises were up in the air." (Tr. 669). Doran testified her concern regarding the raises was based on what she had heard "through another partner that Sara said that the raises were like up for negotiation or they're like not guaranteed and Drake would repeat that sentiment in the meeting that it was kind of up in the air whether we would get the raises or not." (Tr. 671-72). Specifically, all Doran remembered Bellis say about the raises during her PDC was that "they were up in the air." (Tr. 672). Doran also testified Bellis said, "during collective bargaining, it —you would maintain like a status quo, basically, like across the company. So you wouldn't like lose or gain any pay or health benefits or anything of the sorts. So everything would just kind of be frozen until Collective Bargaining had reached a decision." (Tr. 672-73). Doran then testified Bellis

"mentioned that like the—the raises like wouldn't—potentially wouldn't go into effect because of like the maintaining of the status quo. So I wouldn't—you wouldn't be docked pay, but you wouldn't be getting raises either." (Tr. 673).

Regarding the collective bargaining process, Doran testified Bellis told her the "average time that collective bargaining takes is about like 400 some odd days," and that "he cited some kind of statistic." (Tr. 673). Specifically, Doran recalled, "him saying the average—like the time it takes for collective bargaining is about like 400—I think it was like 409 days is what he said." (Tr. 673-74). *See, e.g.*, Robert Combs, *Analysis: How Long Does It Take Unions to Reach First Contracts*, Bloomberg Law News (June 1, 2021) (noting "[b]y cross-referencing two of the databases in Bloomberg Law's Labor PLUS resource and calculating an average, we can pinpoint the average number of days it takes new union locals and their employers to sign that initial CBA. It's well over a year: 409 days, to be exact.").

Lastly, regarding health care benefits, Doran testified she brought up the subject of health care benefits because she "was worried about potentially losing my health coverage through collective bargaining." (Tr. 669). In response, all Doran recalled Bellis saying about it was that "during collective bargaining, you know, people could bargain for like higher wages or different things, you know, at the expense of certain healthcare and that that could affect [her] facial feminization surgery coverage," and that "[i]t's something that not a whole lot of companies cover currently." (Tr. 674).

There is no record evidence Doran was threatened with reprisal if she did not sign up for a PDC, nor is there any evidence of threats of reprisal for not listening to any employer speech during her PDC, nor during any other meeting.

11. Mid-February Telephone Conversation with Maddie Doran

Doran testified she called Bellis a few days after her PDC and asked him again about whether she could transfer out of the store. (Tr. 678). Again, Doran recalled Bellis "gave [her] the same answer" (i.e., "he would have to ask like his higher-ups and see, you know, if it was possible."). (Tr. 675, 678). According to Doran, Bellis called her the next morning to follow up and informed her he had not been able to approve her request to transfer because the store was currently understaffed. (Tr. 679-81). Rather than accept this answer, Doran testified she threatened to quit and reapply at the store she wanted to transfer to bypass the 75th Street store's understaffing issue. (Tr. 681). According to Doran, Bellis replied "do whatever you need to do for your family." (Tr. 681).

12. February 23rd Telephone Conversation with Hope Gregg

On February 23, partner Hope Gregg called Drake Bellis and asked "a few questions" about the union. (GC Ex. 50 at 1). Specifically, she asked whether unionizing would: (1) prevent partners from receiving raises (GC Ex. 50 at 1); (2) prevent partners from picking up shifts at other non-union stores (GC Ex. 50 at 2); (3) mean "we all lose our benefits" (GC Ex. 50 at 3, 8); (4) impact raises in June 2022 (GC Ex. 50 at 8, 9); and (5) impact the ability to "transfer to other stores" (GC Ex. 50 at 11).

Bellis explained the collective bargaining process is a "negotiation" in which the parties "compromise." (GC Ex. 50 at 4). He gave hypothetical examples of this negotiation, describing how if "the union wants our workers to make $25 an hour" Starbucks would likely propose certain benefits cuts, whereas another negotiation could involve the Union proposing "we don't care about wages as much, just pay us minimum wage, and we want, like, all of these killer benefits." (GC Ex. 50 at 4, 7). Bellis stated the parties "have to bargain" terms. (GC Ex. 50 at 5). "Like, the two

sides have to chip away and figure out what they want." (GC Ex. 50 at 5). He explained each collective bargaining process may be different because, "what's important to one store might not be important to another." (GC Ex. 50 at 7).

In response to Gregg's question about whether, in the event of unionizing, "we're not going to receive raises," Bellis stated, "Um, it's all on the table, so it's not a yes or no." (GC Ex. 50 at 1). In response to Gregg's question about whether partners will "be able to work at other stores, or, like, um, pick up hours," Bellis replied there is only one unionized Starbucks store with a collective bargaining agreement and under the terms of that agreement partners in the bargaining unit cannot work at other stores. (GC Ex. 50 at 1-2). Gregg replied, "So if we unionized, we can't—we can't, like, ever work at another store?" and Bellis explained, "That depends on the collective bargaining agreement."

In response to Gregg's question about whether unionization would lead to loss of benefits, Bellis explained benefits would be governed by the collective bargaining agreement and that "I can't tell you anything a hundred percent sure" because "we don't know" what agreement the parties might reach as "they build up to compromise" and "each side has things that are, like, non-negotiable." (GC Ex. 50 at 4). To illustrate this uncertainty, Bellis gave an example of a collective bargaining agreement with higher wages and lower benefits, an example of a collective bargaining agreement with "minimal differences" from the current status quo, and an example of a collective bargaining agreement with low wages and high benefits. (GC Ex. 50 at 4-7). Bellis explained each unionized store "is in their own" collective bargaining process. (GC Ex. 50 at 7).

Bellis also explained that, during the collective bargaining process, Starbucks has a legal obligation to maintain the status quo. He said, "When the process begins, your benefits now are staying at status quo, so that is good." (GC Ex. 50 at 7-8). He stated, "Nothing gets taken away….

That's a protection that I appreciate in the law is that like, nothing—in this process you don't lose anything . . . just like you don't lose anything, you don't gain anything." (GC Ex. 50 at 10). Bellis repeated this point: "During that time period that I'm mentioning when the collective bargaining agreement is being worked out, your benefits and pay stays in status quo." (GC Ex. 50 at 9).

In response to Gregg's question on whether partners would receive June 2022 raises if the store unionized, Bellis responded, "I actually don't know the answer to that…. I'm sorry I don't have an answer for you on that." (GC Ex. 50 at 9). Bellis told Gregg that he had asked the same question because initially "I had interpreted status quo" as meaning that partners would not receive June 2022 raises which "would make it really hard to hire for this store." (GC Ex. 50 at 11). He continued, "When I asked that question, I was told that is up in the air." He reiterated, "I don't actually know the answer to that." (GC Ex. 50 at 11). Gregg asked, "If we do vote yes…it could be taken away." Bellis replied, that, if partners did not receive June 2022 raises it would not be "taken away" but rather, "it just would never come…Nothing—nothing gets taken away. That's the good thing." (GC Ex. 50 at 9-10). He highlighted why the timing of the possible June 2022 raises made the question "tricky," stating, "I don't know the answer to this specific one, but like…let's say in August there's more raises or whatever, then you all would not get that…because just like you don't lose anything, you don't gain anything." (GC Ex. 50 at 10).

In response to Gregg's question on whether partners would be permitted to transfer if the store unionized, Bellis replied, "I don't know the answer to that." (GC Ex. 50 at 12). He continued, "In our store right now people can't transfer because there's not enough people in the store to run it. …people can't transfer right now because, like, I don't have enough people to man the store….that factor has nothing to do with the union. That has to do with running the business." (GC Ex. 50 at 12).

Bellis also told Gregg that "typically" a collective bargaining agreement would "probably" not allow a store manager or district manager to "do work as a barista or a shift supervisor." (GC Ex. 50 at 14). He thanked Gregg for her questions and said, "if I can answer it, I will; if I can't, like, I'll just tell you that I can't, or, you know, I'll tell you, like, how that process works as best as I can to my knowledge." (GC Ex. 50 at 15).

13. March 3rd Meeting at the Marriott Hotel

On March 3, Starbucks held a meeting at the Overland Park Courtyard Marriott hotel at which Bellis and Jenkins engaged in lawful speech highlighting the risks and uncertainties of collective bargaining. Prior to beginning the meeting, Bellis explained he and Jenkins would not record the meeting and stated, "I ask you not to record this, either," explaining the meeting was an "open environment" and "safe space" in which to ask questions. (GC Ex. 51 at 26).

Bellis and Jenkins shared facts including: a first contract takes on average 409 days to negotiate; transfers and picking up shifts are governed by the collective bargaining agreement; contracts remain in place for an average of three years; an eventual collective bargaining agreement may provide "more, less, or the same" (GC Ex. 51 at 34); the employer "can't make promises or guarantees" and "the union does not have the same obligation" (GC Ex. 51 at 27); "voting yes does not guarantee that you will get different pay, benefits, or working conditions" (GC Ex. 51 at 29); "the vote is decided by the majority of those who vote" (GC Ex. 51 at 29); and, "If the store unionizes, everyone is represented by the union whether that is how you voted or not." In addition, they shared their "personal opinions" and "perspective" on unionization. (GC Ex. 51 at 27). Starbucks welcomed partners to participate in "questions" and "respectful dialogue," and thanked partners in advance for engag[ing] even if they "might disagree." (GC Ex. 51 at 27).

In discussing the average length of time required to bargain a first contract, Bellis asked,

"is this gonna be the same team here in 400 days?" (GC Ex. 51 at 39). He stated the store has current "turnover at 122 percent." (GC Ex. 51 at 39). A partner responded, "when you say that, it makes us feel disposable. And I know multiple people on this team really love Starbucks…so when you say 'oh, you might not be the same team,' I find that highly disrespectful to the people that love Starbucks and want to continue working for the benefits." Bellis agreed that many partners love Starbucks and that partners are "absolutely" not disposable. (GC Ex. 51 at 39-40). Jenkins immediately clarified that "It's not about you guys leaving the store. It's about the people that we need to bring on to support the business of the location that's changing the dynamic of the store" because "you guys are understaffed so we are hiring eight to ten partners. So just even bringing on people, we're creating a different dynamic with a different team." (GC Ex. 51 at 40).

Throughout the conversation the managers responded to questions from partners, including about how negotiation works (GC Ex. 51 at 33-34) and who participates in collective bargaining as a representative on the bargaining committee (GC Ex. 51 at 35). Near the end of the meeting, a partner attempted to hand Bellis a representation petition. (GC Ex. 51 at 45). He stated he was legally not authorized to accept it. Jenkins shared information on the notice of election, the mailing of ballots, and the deadline for returning ballots. (GC Ex. 51 at 53).

After the meeting, partners gathered, first in the lobby, then immediately outside the doors to the hotel. (Joint Ex. 5). Jenkins walked out of the hotel to speak with the partners demonstrating outside. (Joint Ex. 5 at 0:03). Jenkins told the partners, "the hotel is asking you guys to leave." (Joint Ex. 5 at 0:03). An unidentified speaker replied, "oh, are they—maybe they can come ask us." (Joint Ex. 5 at 0:05). Jenkins reponded, "okay, thank you," and began walking backwards toward the door. (Joint Ex. 0:08). McCown then told Jenkins, "I have this if you want to put it in the shredder." (Joint Ex. 0:08). Jenkins turned and continued to walk back into the building at a

normal pace. (Joint Ex. 0:08). As she walked through the doors, an unidentified speaker yelled at Jenkins in a high-pitched voice "Fuck off—Ha Ha." (Joint Ex. 5 at 0:14).

A few seconds later, there was a discussion among the partners gathered outside the hotel. Addy Wright asked Noel Christopher "Chris" Fielder, who can be seen on the left side of the frame talking to Orrego, "what did they say?" (Joint Ex. 5 at 0:22). Fielder turned to face the camera and stated, "they said—uh—the hotel asked us to leave." (Joint Ex. 5 at 0:23). The partners continued chatting with one another for a few minutes. One unidentified speaker began counting the group and stated, "Twelve—Thirteen—There's 13 of us." (Joint Ex. 5 at 1:16). Another speaker laughed and said, "they're so scared of like not even 20 people," and remarked of Jenkins, "also why did she look like she was about to cry when she came out here?" (Joint Ex. 5 at 2:18). Another speaker replied laughing, "she's scared of us," "she's scared of her own baristas." (Joint Ex. 5 at 2:20, 2:23).

A few seconds later, Marica Hall, the hotel's General Manager at the time, exited the hotel and told the partners, "if y'all don't wanna get caught for trespassing you need to leave." (Joint Ex. 5 at 3:05). An unidentified speaker replied to Hall saying, "I thought you just told us to come outside." (Joint Ex. 5 at 3:12). Hall interrupted the individual and said, "yeah, but now we [referring to the people demonstrating] need to leave." (Joint Ex. 5 at 3:14). Hall gestured with a sweeping motion of her hands away from her body indicating she was referring to the demonstrators leaving the property. (Joint Ex. 5 at 3:14). Hall then apologized to the partners and said, "I'm sorry, but yeah—you're—you're gonna need to leave." (Joint Ex. 5 at 3:21). The partners then left the hotel property, went across the street to a parking garage for the Overland Park Convention Center and stood in the sidewalk next to that parking garage. (Tr. 694-95).

14. March 11th Hannah McCown Final Written Warning

On February 24, McCown committed a substantial violation of Starbucks' cash handling policies when she left cash out of the store's safe overnight. (Tr. 1445-56; GC Ex. 15).

On March 7, McCown called Jenkins to discuss turning off Mobile Order and Pay. (Tr. 1269). Jenkins asked McCown to get her the Daily Coverage Report ("DCR"). (Tr. 1269; Resp. Ex. 65). At the bottom of the DCR (Respondent's Exhibit 65), there is a line providing total customers projected per each half-hour. (Tr. 1270; Resp. Ex. 65). This chart shows the total number of projected customers based on historic data gathered for the store. (Tr. 1270). Jenkins testified the data in the report was reasonably accurate. (Tr. 1270). The DCR also shows the Items Per Labor Hour (IPLH) projected, predicting how many items, meaning food and drink items, each scheduled partner likely will be preparing each half-hour of the day. (Tr. 1270, 1271). For example, on March 7, the DCR forecast each partner working during the 7:00 a.m. to 7:30 a.m. interval would be responsible for preparing eleven items. (Tr. 1270; Resp. Ex. 65). The DCR similarly forecast each partner working during the 2:00 p.m. to 2:30 p.m. interval would be responsible for preparing four items. (Resp. Ex. 65). Jenkins explained any partner should be able to comfortably handle preparing up to seventeen items per labor hour. (Tr. 1270-71). If a customer orders four drinks and two food items, that would be reflected as six items on the IPLH. (Tr. 1271). Jenkins testified McCown called her on March 7 because McCown wanted to turn off the store's Mobile Order and Pay because only two partners were working and a third partner would not arrive for about an hour to an hour and a half. (Tr. 1271). Jenkins asked McCown about the projected customer occasions, referred to as COSDs, and IPLHs to see if the two partners could handle the projected volume rather than close the mobile channel. (Tr. 1271). McCown never provided the DCR to Jenkins during the call. (Tr. 1272). Jenkins testified looking at the DCR from March 7

now, the report showed two partners could easily handle the volume projected during the time frame in which McCown had called and it was apparent there had been no need for the store to turn off any of its channels. (Tr. 1272; Resp. Ex. 65). Jenkins believed McCown had pretended not to know what Jenkins was asking about or how to find it. (Tr. 1272). Indeed, visual examination of both of McCown's recordings from March 7 show **McCown had the DCR in her hands during those very calls**. (Tr. 247; GC Exs. 10 and 12). Moreover, Jenkins testified when McCown called the second time on March 7, Jenkins spent a considerable amount of time explaining the DCR to McCown, the figures Jenkins needed McCown to locate, what those metrics showed, and why they were important in deciding whether to turn off mobile ordering. (Tr. 1273). Notably, McCown did **not** record that portion of the call. (McCown Tr. 223-24).

McCown was stepping down to a barista position because she had another job and was only available to work the weekends. So she inquired what her pay would look like if she stepped down to barista. (Tr. 1274). Jenkins, who had previously discussed this matter with McCown and had told McCown that she did not know what McCown would be paid following the requested demotion, asked McCown if she was a barista yet. (Tr. 1274-75). Jenkins explained that when a partner's request is processed in the "MMS" system, the system calculates the appropriate wage for the partner considering various factors, including the partner's tenure with Starbucks. (Tr. 1275). When McCown raised this matter again on the March 7 call, Jenkins reminded McCown they had already discussed this, and since the reason for the call was to discuss understaffing, Jenkins felt it was not the time or place to have the same conversation again when McCown's immediate complaint or concern was that only one other partner was working in the store with McCown at that time. (Tr. 1275).

Jenkins further remarked that McCown interrupted her several times, which was something they had also spoken about previously. (Tr. 1276). Jenkins thought McCown was not listening when Jenkins tried to give her answers to her questions, and then McCown hung up on Jenkins very abruptly. (Tr. 1276). Jenkins recalled reminding McCown previously of the expectation McCown would live within Starbucks' mission and values, including showing dignity and respect to others, and Jenkins remarked that McCown's repeated interruptions made clear she was not listening to Jenkins. Jenkins also told McCown that Jenkins felt McCown's tone on the phone was very rude. (Tr. 1276). Following the phone call with McCown, Jenkins sent an email to the Partner Resources Manager, Julie Wendell, expressing frustration about the way McCown had spoken to her on the call. (Tr. 1276; Resp. Ex. 13). Store Manager Seymour called Jenkins shortly thereafter and told Jenkins that McCown had called Seymour, told her she had thrown up, and suddenly needed to go home. (Tr. 1277; Resp. Ex. 13). McCown's need to leave the store compounded the understaffing and forced management to close the store early yet again. (Resp. Ex. 13).

On March 11, Bellis delivered a Final Written Warning to McCown as one of the two manager witnesses addressing both McCown's substantial policy violation in leaving cash unsecured outside the safe overnight as well as McCown's insubordinate behavior on March 7. (Tr. 141, 1451-52; GC Ex. 15). McCown testified Jenkins, prior to delivering the Final Written Warning, reminded her of the Company's Recording Policy and asked her to review it. (Tr. 141-42; GC Ex. 14). McCown said Jenkins told her "they would no longer tolerate the recording of other partners and management ***except for the exceptions listed under the federal law exception***." (Tr. 142).

To clarify, Starbucks maintains a lawful recording policy, which provides: "Personal video recording, audio recording or photographing of other partners or customers in the store without

their consent is not allowed ***except as protected under federal labor laws***." (GC Ex. 14) (emphasis added). Thus, the referenced exception includes recordings protected by federal ***labor laws***, including the National Labor Relations Act.

15. March 11th Conversation with Hannah Edwards

As explained above, Starbucks expects its shift supervisors to maintain sufficient availability conducive to the needs of the business. (Tr. 1266; Resp. Ex. 7). Although store managers strive to balance partner availability with business needs when creating schedules, Starbucks does not guarantee nor does it make any assurances "that hourly partners will receive their preferred hours or shifts, the same schedule each week, a minimum or maximum number of hours, or that a request for a schedule change will be approved." (Resp. Ex. 7). According to Jenkins, shift supervisors are expected to work a minimum of twenty-eight hours a week and to be available for thirty-four hours during the week. (Tr. 1266). Likewise, shift supervisors should be available to work during "peak" times and not first start their shifts during the middle of "peak" business times. (Tr. 1266).

Regarding scheduling, all partners, including baristas and shift supervisors, are expected to maintain their availability in the scheduling system. (Resp. Exs. 7, 9). Store Managers, in turn, use that information to build schedules and should "[c]onsistently post schedules three weeks out" (Resp. Ex. 9 at 2). Store Managers also share responsibility for "[e]nsur[ing] partner availability is accurately reflected in the scheduling system" (Resp. Ex. 9 at 2).

According to Edwards, Jenkins arrived at the 75th Street store on March 11 and spoke with Edwards about her availability. (Tr. 311). Edwards testified Jenkins told her they were "working on figuring out how many supervisors were really needed at every store[,]" and that Edwards's availability "no longer worked for Starbucks." (Tr. 313). Edwards testified she understood

Jenkins's reference to "supervisors" to mean shift supervisors and the number needed to effectively run the store, noting each store has a different number of allowed shift supervisors. (Tr. 313). Edwards testified Jenkins said that Edwards's Monday, Wednesday, Friday shifts were not long enough, that they needed to be at least seven hours, and that her weekend availability was not sufficient. (Tr. 313). Edwards further testified Jenkins told her she needed to make herself available for one additional day each week to remain a shift supervisor. (Tr. 313). Edwards testified she responded that her availability was limited because (1) she had a college class for which she had already paid, (2) if she stayed at the store two extra hours on each of those days she could not attend that class for the rest of the semester, and (3) she had class on the other two weekdays preventing her from working then. (Tr. 313-14). Edwards claimed Jenkins "stipulated" Edwards had to be available to work on both Saturday and Sunday to remain a shift supervisor. (Tr. 364).

Edwards testified Jenkins explained the arrangement "would be just if the store needed that time to be filled." (Tr. 366). Edwards understood this to mean that if the store needed the store hours to be filled, Jenkins expected Edwards would work both Saturday and Sunday. (Tr. 366). Jenkins told Edwards she needed to add an additional day of availability and, as explained above, Edwards told her it could not be a Tuesday or Thursday because of her classes. (Tr. 366). Since Edwards already worked Monday, Wednesday, Friday, and Saturday, that left Sunday as the only other day (apart from Tuesday or Thursday) for which Edwards could possibly be available. (Tr. 366). Jenkins offered Edwards an opportunity to continue employment at Starbucks as a barista, rather than a shift supervisor, because of her limited availability. (Tr. 418). Edwards was unhappy with the choices Jenkins offered. (Tr. 418). Ultimately, Edwards testified "[s]ince [she] was not ready to resign or step down [she] opened up [her] availability." (Tr. 366-67).

Edwards testified she had been a student at Johnson County Community College for the previous two years and was double majoring in floral design and accounting. (Tr. 261). According to Edwards, Spring semester began in the middle of January and ended in the middle of May. (Tr. 261). She testified her schedule in January 2022 was "consistently" "Monday, Wednesday, Friday 5:00 a.m. to 10:00 a.m., and Saturdays 5:00 a.m. until 1:30 p.m." (Tr. 261). Edwards maintained her availability was limited because some of her required classes were only offered in person in the morning, so she had to work before her classes started and not on Tuesdays and Thursdays when she had multiple classes. (Tr. 261-62). Edwards testified she had arranged her work schedule in Fall 2021 with then Store Manager Leeper before registering for any classes. (Tr. 262). She further testified when she and Leeper arranged her work schedule she had expected her work schedule to last through the end of the semester in mid-May so that work would not interfere with her college courses. (Tr. 262). Edwards testified she had worked a "similarly modified schedule" during the previous two years while enrolled at Johnson County Community College and had reached a similar availability agreement with Bellis in 2020. (Tr. 262).

General Counsel Exhibit 46(a) directly contradicts Edwards's testimony regarding her availability in January and in the previous year. (GC Ex. 46(a)). According to the time records, Edwards was not consistently working Monday, Wednesday, Friday 5:00 a.m. to 10:00 a.m., and Saturdays 5:00 a.m. until 1:30 p.m. in January 2022. (Tr. 261). Instead, the data shows a marked difference between Edwards's availability in October 2021, when she averaged thirty hours a week, and on March 11, 2022 (the date she and Jenkins spoke), when she only averaged eighteen hours a week, far below the requisite twenty-eight to thirty-five hours a week expected of shift supervisors at Starbucks. (GC Ex. 46(a)).

Work Week	Total Hours	Days Worked[3]
Week of 10/04/2021 to 10/10/2021	35	M, Tu, W, F, Sat
Week of 10/11/2021 to 10/17/2021	43.75	M, Tu, W, Th, F, Sat
Week of 10/18/2021 to 10/24/2021	18.75	M, Tu, W
Week of 10/25/2021 to 10/31/2021	0	None
Week of 11/01/2021 to 11/07/2021	17	F, Sat
Week of 11/08/2021 to 11/14/2021	27	M, W, F, Sat
Week of 11/15/2021 to 11/21/2021	29	M, Tu, W, Th
Week of 11/22/2021 to 11/28/2021	35.75	M, Tu, W, F, Sat
Week of 11/29/2021 to 12/05/2021	44.5	M, Tu, W, Th, F, Sat
Week of 12/06/2021 to 12/12/2021	26.75	M, W, F, Sat, Sun
Week of 12/13/2021 to 12/19/2021	33.75	M, Tu, W, Th, F, Sat
Week of 12/20/2021 to 12/26/2021	23.5	M, Tu, W, F
Week of 12/27/2021 to 01/02/2022	20	Tu, W, F
Week of 01/03/2022 to 01/09/2022	32	Tu, W, Th, F
Week of 01/10/2022 to 01/16/2022	0	None
Week of 01/17/2022 to 01/23/2022	23.75	M, W, F, Sat
Week of 01/24/2022 to 01/30/2022	41.5	M, Tu, W, F, Sat, Sun
Week of 01/31/2022 to 02/06/2022	27.5	M, W, F, Sat
Week of 02/07/2022 to 02/13/2022	18.5	M, F, Sat
Week of 02/14/2022 to 02/20/2022	18	M, W, Sat
Week of 02/21/2022 to 02/27/2022	11	M, W, F
Week of 02/28/2022 to 03/06/2022	24	M, W, Th, F, Sat
Week of 03/07/2022 to 03/13/2022	19.25	M, F, Sat

(*See* GC Ex. 46(a)).

Additionally, during her PDC on February 16 (Joint Exhibits 3 and 4), Edwards began by letting Bellis know she had a new job with a flower shop. (Joint Ex. 3 at 0:35). Edwards then asked Bellis to update her availability in Partner Hours to reduce her Saturday availability down from an 8-hour shift to a 5-hour shift. (Joint Ex. 3 at 1:24). Edwards said she did not know if her request would be approved because she knew some managers required Shift Supervisors to work as an

[3] This table was compiled using only the time record data admitted as General Counsel's Exhibit 46(a) for Hannah Edwards for all shifts worked up to and including the week of March 11.

opener or closer on a weekend day. (Joint Ex. 3 at 1:24). Bellis replied, "it depends on the needs of business." (Joint Ex. 3 at 1:24). Edwards explained she would rather come in later in the morning and leave by 1:30 p.m., but said if it was not possible, she would work the opening shift. (Joint Ex. 3 at 3:30). Edwards wanted to change her Saturday availability to 8:00 a.m. to 1:30 p.m. (Joint Ex. 3 at 5:05). Edwards acknowledged during the PDC the requested adjustment would reduce her hours to around 20.5 hours a week, far below the required hours expected for a Shift Supervisor. (Joint Ex. 3 at 7:30). Edwards also explained that in addition to school she was juggling two jobs, and she had already thought about stepping down from shift supervisor to barista. (Joint Ex. 3 at 20:53). This demonstrates that long before March 11, Edwards had already begun taking steps to reduce her availability to hours below the minimum requirements for a Shift Supervisor. Any suggestion Jenkins took action against her because she supported the Union bears no reality to Edwards's own realization her increasingly busy schedule foreclosed her from remaining sufficiently available to continue as a shift supervisor.

16. March 11th Conversation with and Maddie Doran

Starbucks maintains robust cash management policies and procedures to minimize loss and keep its stores safe. (Tr. 1288-92, 1504-08, 1514; Resp. Exs. 2, 3, 4, 8, 10, 23, 24, 76, 77, 78, 79). For example, Starbucks's systems separately denote and track for each business date: (1) "system count" (listing the computer's total cash sales amount for the day); (2) "cash controller count" (referring to the total entered into the system by the day's cash controller reflecting the total amount of cash counted when the store closed); (3) "cash controller adjustments" (showing any adjustments made to the cash controller's initial count); (4) "finalized amount" (referring to the cash controller's final count after any adjustments are made—this number gets printed on the deposit slip and placed in the deposit bag); (5) "finalized by" (listing the name of the day's cash

controller completing the count); (6) "bank verified amount" (listing the bank's count of the funds received); (7) "total bank variance" (listing the difference between the finalized amount and the bank verified amount); and (8) "status" (listing the status of the funds). (Resp. Exs. 8, 23 at 7). Additionally, store managers have a list of items they are supposed to audit every Monday, which includes going through cash handling procedures to check records and deposits. (Tr. 1511; Resp. Ex. 23). Part of the process includes checking the day a deposit was created, who created it, the amount that the deposit should have totaled, the amount that was entered, whether it was picked up by Garda (the courier), and whether it was verified by the bank. (Tr. 1511-12; Resp. Ex. 23).

In February, while she was still training as Store Manager, Seymour and a store manager trainer named Michelle Pearl discovered several irregularities in the store's cash management system while performing a store manager's Monday audit for the 75th Street store. (Tr. 1511, 1582). There is no record testimony concerning the precise date when Pearl and Seymour discovered the unverified deposits. Seymour, who was hired on January 3, 2022, testified she discovered the cash discrepancies during a Monday audit with Pearl sometime in February during the third or fourth week of her store manager trainings, which followed two weeks of Barista training and two weeks of Shift Supervisor training. (Tr. 1502-03, 1511, 1554-55). Based on the testimony, it appears the discovery occurred on either February 14th (the Monday of Seymour's third week of store manager training) or February 21st (the Monday of Seymour's fourth week of store manager training). (Tr. 1554-55).

Notably, Seymour and Pearl came across several unverified deposits during the audit process. (Tr. 1512, 1582). An unverified deposit is a deposit that never made it to the bank, according to DTE, one of the cash management systems at Starbucks. (Tr. 1346, 1582). Typically,

a Starbucks store will have no more than two unverified deposits—total—for an entire year. (Tr. 1293).

Seymour detailed the store manager's weekly audit process. According to Seymour, Respondent's Exhibit 25 contains screenshots of the 75th Street store's deposit activity report viewed during her training with Pearl. (Tr. 1516; Resp. Ex. 25). For example, looking at deposit bag number 4634499599 created on January 8, 2022, the report shows the deposit originated at Store 20346 in Overland Park, Kansas, the finalized amount of money placed in the bag as $569.59, that the deposit was sent to US Bank, that the courier was "G," which stands for Garda, the status of the deposit as "In Transit," a checkmark showing when the deposit was created, a checkmark showing the deposit was picked up by Garda, and an "X" in the furthest column on the end showing the deposit was never verified by the bank. (Tr. 1517; Resp. Ex. 25 at 1, 7th Row in the Chart). An "X" in the last column of the chart indicates the deposit bag in question was not deposited and verified by the bank. (Tr. 1517; Resp. Ex. 25). A "D" in the last column of the chart indicates the deposit bag was received by the bank and verified but the amount of money verified by the bank differs from the amount of money listed on the deposit slip placed in the bag listing the amount finalized by the cash controller. (Tr. 1518; Resp. Ex. 25). Seymour explained that if the deposit occurred within the prior 18 weeks you can view the name of the cash controller in the deposit activity screen admitted as Respondent's Exhibit 23. She also explained she can determine which shift supervisor was the cash controller for a particular closing shift by checking the time and attendance systems. (Tr. 1518; GC Ex. 46(a)).

While reviewing the 75th Street store's deposit reports for the store's weekly audit, Seymour and Pearl discovered no less than thirty-six unverified deposits for the 75th Street store between October 28, 2021 and January 13, 2022. (Tr. 1512, 1582; Resp. Ex. 25). As shown in

Respondent's Exhibit 25, the unverified deposit dates and amounts include: 01/08/2022 ($569.59), 12/28/2021 ($510.34), 12/22/2021 ($703.09), 12/13/2021 ($10.00), 12/12/2021 ($828.55), 12/09/2021 ($551.38), 12/08/2021 ($814.33), 12/07/2021 ($572.53), 12/05/2021 ($711.68), 12/02/2021 ($781.99), 11/11/2021 ($661.02), 11/10/2021 ($334.73), 11/09/2021 ($817.45), 11/01/2021 ($494.17), 10/31/2021 ($749.05), 10/30/2021 ($628.57), 10/28/2021 ($735.53), 10/27/2021 ($605.14), 10/26/2021 ($646.15), 10/26/2021 ($213.00), 10/24/2021 ($744.49), 10/22/2021 ($573.58), 10/21/2021 ($602.05), 10/20/2021 ($383.15), 10/19/2021 ($515.70), 10/19/2021 ($213.00), 10/12/2021 ($213.00), 10/17/2021 ($559.53), 10/16/2021 ($664.94), 10/14/2021 ($798.21), 10/13/2021 ($549.09), 10/12/2021 ($539.85), 10/10/2021 ($832.51), 10/08/2021 ($609.90), and 10/07/2021 ($554.34). (Resp. Ex. 25). In total, the deposit activity report reflected roughly $20,000 in cash sales from the 75th Street store as unverified deposits. (Resp. Ex. 25).

In addition to those thirty-six unverified deposits, Seymour and Pearl also discovered a deposit from November 4, 2021, was not just unverified, but missing altogether. (Resp. Exs. 25, 27). According to the system, the store's registers logged $591.54 in cash sales for November 4, 2021. (Resp. Ex. 27 at 2). However, there was no record in the deposit reports of any deposit between November 3 and November 5 2021. (Resp. Ex. 25 at 5).

Seymour and Pearl called Jenkins and told her about their discoveries. (Tr. 1519, 1582). Upon learning this information, Jenkins began investigating, focusing first on the missing deposit bag from November 4, 2021. (Resp. Ex. 27). Jenkins collected the information she could from her available resources and reached out to Kevin Gillis, a partner specializing in loss prevention, to ask for support with the investigation. (Tr. 1294-95; Resp. Ex. 27). Gillis then reached out to Starbucks' Global Retail Compliance Analytics team seeking assistance in locating the missing

deposit from November 4, 2021. (Resp. Ex. 27). Counsel for General Counsel mistakenly objected to the completeness of this exhibit, but later withdrew his objection and corrected his mistaken belief on the record. Respondent's Exhibit 27 is a complete email thread. (Tr. 1295, 1299).

On March 2, Sonya Schroeder, a lead investigator specializing in loss prevention, responded to Gillis and Jenkins on behalf of the Global Retail Compliance Analytics Department. (Resp. Ex. 27). Schroeder explained she was unable to investigate the missing deposit further due to its age as she no longer had any video footage or safe times for November 4. (Resp. Ex. 27). Schroeder further explained "the window for claiming any banking gaps is 30 days[,]" so nothing further could be done to recover the November 4 missing deposit. (Resp. Ex. 27). However, Schroeder did recommend that Jenkins take certain steps for future loss prevention, including close monitoring of all Cash Management and DTS systems at the 75th Street store and weekly reporting of any discrepancies going forward. (Resp. Ex. 27).

Jenkins next focused on investigating the 36 unverified deposits. Jenkins collected documents from Seymour and Pearl, including screenshots of the unverified deposits and pictures of the courier log from those dates. (Tr. 1520-21). Using time and attendance records, Jenkins discovered Maddie Doran was the shift supervisor responsible for closing the store on all but one of the thirty-six days for which there were unverified deposits. (Tr. 1294, 1512-13, 1583, 1590; Resp. Ex. 25; GC Ex. 46(a)). Jenkins contacted Gillis again to see if he could help her identify the cause of the 31 unverified deposits. (Tr. 1583). She also reached out to courier services, who handles Garda and issues concerning the transport of deposits. (Tr. 1583). She further contacted several other departments, including Revenue, Accounting, and Sales Audit to see if they could help identify what was causing all the unverified deposits. (Tr. 1583). Lastly, she reached out to Starbucks' Partner Relations (i.e., Human Resources/Employee Relations) Department for

additional advice to see whether a partner's policy failures could be causing all the unverified deposits. (Tr. 1519, 1583). After speaking with Partner Relations, Jenkins decided to have a conversation with Doran focused on confirming Doran knew the cash handling process, exploring Doran's knowledge of closing processes, and having Doran clarify what was causing all of Doran's unverified deposits. (Tr. 1297-98, 1519, 1583-84).

On March 11, Jenkins and Bellis met with Doran regarding the unverified deposits. (Tr. 1298). During the conversation, Jenkins asked questions to determine if Doran understood what the cash reports said, how to accurately close the store, how a deposit could appear as unverified, and other similar questions to see what if anything she could recall about her closing activities. (Tr. 1297-98). Jenkins explained the purpose of her conversation with Doran on March 11 was to discuss the execution of her closing procedures to attempt to prevent future unverified deposits, not to discuss any cash variances. (Tr. 1346-47).

At the hearing, Jenkins explained that unverified deposits and cash variances are two entirely separate matters. (Tr. 1347). Jenkins further explained she did not accuse Doran of theft during the March 11 meeting. (Tr. 1298-99, 1347, 1584). Jenkins simply asked questions around the practices Doran used for cash management to determine why these unverified deposits were happening so they could work together to prevent them from happening again in the future. (Tr. 1347). Indeed, Jenkins explained that because she was unable to confirm the cause of the thirty-one unverified deposits (e.g., theft, negligence, inadequate training, poor leadership by Leeper, fault of the courier, etc.), Jenkins did not discipline Doran for any of them. (Tr. 1584-85).

In the weeks that followed, Jenkins closely monitored the 75th Street store's cash management systems as instructed by the Loss Prevention Department. (Resp. Ex. 27). On March 21, Jenkins contacted the Revenue Accounting Department for assistance in investigating several

more recent unverified deposits, including: 03/04/2022 ($543.41), 02/16/2022 ($618.73), 01/08/2022 ($569.59), and 12/28/2021 ($510.34). (Resp. Ex. 18 at 9). On March 22, the Revenue Accounting Department replied indicating they were able to confirm 3 of the 4 deposits made it to the bank, but they could not confirm the amount of those deposits verified by the bank nor could they locate any deposit from January 8. (Resp. Ex. 18 at 8). For the missing deposit, the Revenue Accounting Department asked Jenkins to provide the signed courier log containing the entry from January 8. (Resp. Ex. 18 at 8). Jenkins emailed a photo of the log, but there was no entry in the courier log from January 8 either. (Resp. Ex. 18). Instead, the log showed couriers picked up deposits on January 7 and January 11, but nothing in between those two dates. (Resp. Ex. 18). Jenkins let the Revenue Accounting Department know the partner had failed to log the missing January 8 deposit. (Resp. Ex. 18). The Revenue Accounting Department responded that without a signed entry in the courier log for the January 8 deposit, there was nothing further it could do to confirm what happened to the missing deposit. (Resp. Ex. 18).

From there, Jenkins emailed Christine Hougland, a Starbucks Treasury Analyst Associate, and Josh Lukens, an Internal Audit Analysis Manager, to see if either could help. (Resp. Ex. 18 at 7). Lukens replied, adding Schroeder from Loss Prevention to the email chain, but added unnecessary confusion by mistakenly characterizing Jenkins's latest email as an email concerning the thirty-one unverified deposits when, as explained, Jenkins's sole interest in this instance was the unverified January 8 deposit that the Revenue and Accounting Department had confirmed was missing. (Resp. Ex. 18 at 6).

On March 23, Schroeder responded indicating an unverified deposit could occur if the cash controller fails to include a deposit slip in the deposit bag, in which case the money would get deposited into a general Starbucks fund at the bank. (Resp. Ex. 18). Schroeder felt the number of

missing bags indicated an operational issue and asked if the store had borrowed deposit slips, run out of deposit slips, or borrowed shift supervisors from other stores during these dates. (Resp. Ex. 18). In response, Jenkins confirmed the store had not borrowed deposit slips, had not run out of deposit slips, and had not borrowed any shift supervisors during the dates of any of the store's unverified deposits. (Resp. Ex. 18).

Hougland then responded, no different than the Revenue and Accounting Department had concluded previously, that the courier log was key. (Resp. Ex. 18). Hougland confirmed she could only follow up with respect to deposits recorded and for which a shift supervisor had signed in the courier log. (Resp. Ex. 18). If a deposit is not written in the courier log, the bank and the courier will refuse to research it further. (Resp. Ex. 18).

Schroeder continued to puzzle over how such a large number of deposits for this store remained listed as "in transit" in the system and were not showing up "in their cash over sho[r]t." (Resp. Ex. 18). Although Schroeder confirmed the deposits appeared to have been scanned by a courier, his department could not take action to hold the courier accountable for any money missing from those deposits without the signed courier log from the date in question. (Resp. Ex. 18).

Despite all the emails, no one could confirm the amount of the deposits which ultimately reached the bank, why so many deposits continued to appear as "in transit" and unverified, why they all appeared to be associated with one partner, or why no other neighboring store experienced the same issues despite using the same courier. (Resp. Ex. 18). Jenkins speculated Leeper could have played a role in the issue, noting the number of unverified deposits abruptly ended after Leeper left the store. (Tr. 1298; Resp. Ex. 18).

As of March 28, Jenkins had not solved the mystery of the unverified deposits. (Resp. Ex. 18). However, the investigation made clear that the store's cash handling practices were not up to

Starbucks standard and had created an environment in which management could not determine whether theft of cash had occurred.

17. April 1st Termination of Michael Vestigo

On March 11, Store Manager Jen Seymour overheard a conversation between Maddie Doran, Hannah McCown, and Michael Vestigo regarding missing deposits at the store. (Resp. Exs. 33, 69). While all four individuals testified regarding the substance of that conversation, Seymour's testimony stands uncontradicted. Unlike Seymour, who testified about what she had heard with confidence and certainty, Vestigo, Doran, and McCown all testified they had little to no recollection of their March 11 discussion.

Vestigo testified Doran told him "that she had been accused of stealing $20,000 over the course of eight months." (Tr. 451-52). Vestigo testified he then spent thirty minutes or so discussing the accusations against Doran and organizing a strike at the store. (Tr. 452). Vestigo further testified regarding what he recalled from that conversation, stating "[i]t was evident that Sara believed that Maddie could have been responsible for $20,000 of the store's missing money and that they were going to like look into it." (Tr. 466). Vestigo believed Jenkins may have mentioned to Doran "something about wanting nothing more than I think monetary like reimbursement." (Tr. 466). Vestigo recalled being shocked by Doran's statements concerning her discussion with Jenkins. (Tr. 452). Vestigo described Doran as upset and very distraught. (Tr. 454). He described Hannah McCown as shocked and upset. (Tr. 454). But Vestigo testified he did not recall whether he was wearing a headset, nor did he recall any other specifics about the discussion that day with Doran and McCown regarding Doran's conference with Jenkins. (Tr. 454, 455, 463-64, 466, 477).

Hannah McCown also did not recall much about the March 11 conversation. (Tr. 150). McCown testified "[t]he only thing [she] really remembers are talking about the strike and then also being very upset that [they] felt Sara was targeting Maddie." (Tr. 150-51, 205). McCown described Vestigo as being "very pumped up" and "a very passionate person." (Tr. 150, 205-06). She described the tone of the conversation as serious and not joking because they took the allegations very seriously. (Tr. 206). Lastly, McCown agreed any threat of violence should be taken seriously. (Tr. 207).

Doran recalled the least about her conversation on March 11. (Tr. 703, 810-12, 814, 816). Doran conceded the partners usually wear their headsets while in the store. (Tr. 810-11). She remembered telling McCown and Vestigo about her conversation with Jenkins and remembered both McCown and Vestigo becoming very angry and distraught. (Tr. 809-10). Doran could not remember anything else about the conversation. (Tr. 814-16).

Seymour testified Doran went to a meeting with Bellis and Jenkins. (Tr. 1530). Following the meeting, Seymour received a phone call from Jenkins letting her know Doran was on her way back to the store, Jenkins had spoken to Doran about needing to remain professional, and Seymour should have a similar conversation with Doran about remaining professional before Doran began her shift on the floor. (Tr. 1530). Seymour sat at the desk at the back of the store, removed her headset, and performed administrative work while she waited for Doran to arrive. (Tr. 1530). Seymour spoke with Doran briefly upon her arrival, assuring her the substance of Doran's discussion with Jenkins and Bellis would remain confidential and the team did not need to know about it. (Tr. 1531). Seymour remained at her desk after speaking with Doran. (Tr. 1531). Seymour put back on her headset, as she customarily wears her headset while in the store to be available if any of the partners need her help. (Tr. 1531).

Seymour testified when she put back on the headset, she overheard a conversation between Doran, Vestigo, and McCown about Doran's meeting with Bellis and Jenkins. (Tr. 1531). Doran said Bellis and Jenkins had basically accused her of stealing money and she was not going to take the fall for somebody else stealing money. (Tr. 1532). Doran told them about Jenkins's reminder to be professional on the sales floor. (Tr. 1532). Vestigo responded, "I will give her professional. I will punch her in her fucking mouth." (Tr. 1532). According to Seymour, Vestigo sounded very aggressive. (Tr. 1532). Seymour then took off her headset because she felt very uncomfortable and shocked by what she had heard. (Tr. 1532).

Seymour called Jenkins and explained what she had overheard and how she felt very uncomfortable being in the store. (Tr. 1532-33). Jenkins told Seymour she could leave and—if needed—take the next few days off. (Tr. 1532). Seymour then left the store. (Tr. 1532).

Seymour testified she called Jenkins again after leaving the store. (Tr. 1532, 1533). During the second conversation, Jenkins asked Seymour to prepare a written statement about what she overheard. (Tr. 1533, 1557-58). Seymour could not recall whether she wrote the statement on Friday or on the following Monday. (Tr. 1557-58). Seymour confirmed Respondent's Exhibit 33 is the statement she drafted and accurately memorializes her recollection of the discussion between Doran, Vestigo, and McCown. (Tr. 1533; Resp. Ex. 33). Seymour's statement reads:

> Maddie had just come from a meeting with district manager Sara Jenkins and store manager Drake Bell. Maddie stated that she was told deposits were missing from shifts that she was the closing manager. She told them she was not going to go to prison because someone is stealing money and trying to pin it on her. Micheal [sic] then stated that this is bullshit and they are only trying to target people that are pro union and he's tired of it. Maddie also stated that Sara reminded her of the company policy on recording conversations and that she needed to please remain professional and respectful during their conversation. Michael stated that he would show Sara respect with his fist to her fucking mouth. Maddie also stated that they would be reviewing video to see if they see anything with the deposits. Michael then stated that if they were reviewing video, they would see everything that is on video.

> Hannah and Maddie both got very upset with that. They both got very panicky, and both said oh my god! Hannah stated that she could not handle this and does not feel comfortable working in the store anymore. Maddie also stated that when she said she was not the one taking the money Sara asked her if she knew who it could be. She stated that she wasn't fucking giving any names.

(Resp. Ex. 33). Seymour emailed her written statement to Jenkins on Monday once she had returned to work. (Tr. 1533-34; Resp. Ex. 69). Seymour testified she personally had no further involvement in the investigation surrounding Vestigo's threatening remark beyond emailing her written statement to Jenkins on Monday, March 14. (Tr. 1323, 1348-50, 1534, 1555-56; Resp. Ex. 69).

Upon receipt of Seymour's statement, Jenkins forwarded Seymour's email and attached statement to Kimberly Harris, a partner within Starbucks' Partner Resources team, in accordance with the company's workplace violence policy, to initiate an investigation into Vestigo's violent remark relating to Jenkins. (Tr. 1323, 1350; Resp. Exs. 30, 69). As part of that investigation, Jenkins instructed several managers to collect statements regarding Vestigo's alleged threat and provided those statements to Starbucks' Partner Resources Department. (Tr. 1309; Resp. Exs. 19, 32, 33, 68, 69).

On March 26, Bellis and Jacqueline Neese each met with partners to discuss what those partners remembered from their conversations with Vestigo on March 11. (Tr. 1555; Resp. Exs. 19, 68). Both Bellis and Neese emailed written statements to Jenkins summarizing their conversations with those partners. (Resp. Exs. 19, 68). According to both statements, Doran admitted hearing Vestigo comment about punching Jenkins in the face. (Resp. Exs. 19, 68). McCown, however, did not remember Vestigo making the statement at issue. (Resp. Ex. 68).

Jenkins was not herself involved in the investigation into Vestigo's alleged threat because the threat had been directed at her. (Tr. 1309). As a result, Jenkins did not know whether Vestigo

himself was questioned during the investigation. (Tr. 1549, 1592). Jenkins's sole role was limited to collecting the statements and providing those statements to Starbucks' Partner Resources team (Tr. 1309-10; Resp. Exs. 68, 69). The removal of Jenkins from the situation was intentional because, in accordance with Starbucks policy, Vestigo was not suspended during the investigation, and therefore Jenkins was not permitted to be in the store with Vestigo until the investigation had concluded. (Tr. 1309, 1549, 1586-87).

Counsel for General Counsel had several questions for Jenkins about how Respondent Exhibit 32 was created. Jenkins testified she created this document by copying the content of an email into a word document. Jenkins explained that when she had previously attempted to send statements contained in emails to the Partner Resource Support Center (PRSC) or to her Partner Resources Manager (PRM), there were times the recipient could not open them. So her common practice involved copying the email into the body of a word document and to send any statements during an investigation as attachments. (Tr. 1310). Further, to allay any concerns General Counsel might have had about the authenticity of the copied email's content, Starbucks obtained and produced both the original email and the word document versions of any of the documents Jenkins created during the Vestigo investigation. *Compare* Resp. Exs. 32, 33 *with* Resp. Exs. 68, 69. Importantly, the content of all the exhibits is identical; this confirms that none of the content of any of these statements was altered. (Tr. 1310).

Jenkins testified in her experience partners who have made threats of violence are not suspended during the pendency of the investigation. (Tr. 1586). According to Jenkins, Starbucks views everyone as a partner, so during the investigation all partners remain in their regular position. (Tr. 1586). As noted above, partners alleged to have made personal threats do not work alongside the target of the alleged threat while the investigation is ongoing. (Tr. 1586-87).

Jenkins involved Partner Resources in the investigation to make sure that an objective decision was made regarding the appropriate action to take regarding Vestigo's alleged threat. (Tr. 1350). Starbucks has multiple written safety and security policies designed to prohibit and prevent violence in the workplace. (Tr. 1306-07; Resp. Exs. 30–31). The Workplace Violence Policy set forth in Starbucks Safety and Security Manual provides:

> If there is a report of workplace violence or a threat of violence, immediately inform your next-level leader and Partner Relations. Violent conduct or behaviors prohibited by this policy are those that significantly affect the workplace, generate a concern for personal safety or could result in damage to property, physical injury, or death.
>
> These include, but are not limited to:
>
> - Disruptive, aggressive, or abusive behavior that generates anxiety or creates a climate of distrust
> - Statements or behaviors that can reasonably be perceived by a partner as intimidating, frightening or threatening, and that generate concern for personal safety
> - The exercise of or attempt to exercise physical force against a partner that causes or could potentially cause physical injury, including pushing, shoving, hitting, punching, kicking, throwing an object, or using a weapon of any kind
> - Threating or violent words delivered in person or remotely, including by phone, mail, email, text or other forms of social media
> - Sexual violence against a partner.

(Resp. Ex. 30). Starbucks maintains a similar Workplace Violence Policy in its Partner Guide, which provides, in relevant part:

> Starbucks is committed to preventing workplace violence and taking all reasonable steps to protect partners from workplace violence. . . . Starbucks strictly prohibits violence and threats of violence in the workplace that may put a partner at risk, including violent conduct between partners, violent conduct toward partners made by customers or vendors, and any domestic violence directed toward a partner while at work. This includes, but is not limited to, violence and threats of violence on Starbucks premises, at Starbucks events or while conducting Starbucks business.
>
> A threat of violence prohibited by this policy includes conduct or behavior that reasonably could be interpreted as conveying and intent to engage in violence or to

> cause injury or harm to a person or property. Threatening conduct or behavior is not limited to in-person verbal or physical action; it can also include remote activity.
>
> Violent conduct or behaviors prohibited by this policy are those that significantly affect the workplace, generate a concern for personal safety or could result in damage to property, physical injury, or death. These include, but are not limited to:
>
> - Disruptive, aggressive, or abusive behavior that generates anxiety or creates a climate of distrust;
> - Statements or behaviors that can reasonably be perceived by a partner as intimidating, frightening or threatening, and that generate concern for personal safety;
> - The exercise of or attempt to exercise physical force against a partner that causes or could potentially cause physical injury, including pushing, shoving, hitting, punching, kicking, throwing an object, or using a weapon of any kind;
> - Threatening or violent words delivered in person or remotely, including by phone, mail, email, text or other forms of social media; or
> - Sexual violence against a partner.
>
> . . . Any partner who engages in conduct or behaviors involving workplace violence or a threat of violence ***may be subject to immediate separation*** from employment.

Resp. Ex. 31 (emphasis added). Vestigo, like all partners, received a copy of the Partner Guide at the start of his employment. (Resp. Ex. 70 at 3). On November 2, 2020, Vestigo executed an electronic acknowledgment, which provided, in relevant part, "[b]y signing below, you acknowledge . . . that your failure to uphold the policies and expectations set forth in this Partner Guide may result in corrective action, up to and including termination of employment." *Id.* Accordingly, Vestigo acknowledged his "failure to uphold the policies and expectations set forth in th[e] Partner Guide," which includes the Workplace Violence Policy, "may result in corrective action, up to and including termination of employment." *Id.* (Resp. Ex. 31.).

At the hearing, Vestigo testified he is aware of Starbucks' workplace violence prevention policy. (Tr. 470). He testified he understands that policy to prohibit even a threat of violence. (Tr.

470-71). Vestigo also testified his understanding of the workplace violence prevention policy from when he worked at Starbucks was that the policy aims to provide a safe and welcoming workplace for all employees and customers alike. (Tr. 470).

Based on the investigation results, the statements that were gathered, and the policies that were violated, Jenkins made the decision to separate Vestigo. (Tr. 1587; GC Ex. 24). Seymour and Bellis then met with Vestigo on April 1 to deliver his notice of separation to him. (Tr. 1535-36).

18. March 28th Lawful Termination and Reinstatement of Alydia Claypool

Since the outset of the pandemic, Starbucks has required all partners to complete COVID check-in procedures before starting any shift or attending any Company event. (Tr. 558). The COVID check-in process prior to April 4 required that partners take their temperatures, answer questions on the COVID Coach app to determine the existence of any symptoms and complete the "Partner Pre-Check Log." (Tr. 558-59, 624, 1301-02; Resp. Exs. 5, 40, 41, 64). The entire COVID check-in process is set forth in the Partner Pre-Check Log. (Resp. Ex. 41 at 2). Starbucks' COVID-19 process lists several instances in which partners must leave the premises to return home immediately, including: "If the partner's temperature is 38°C or 100.4°F or higher[,]" or "[i]f the partner receives a message of partner should not come to work from the COVID-19 Virtual Coach[.]" (Resp. Ex. 41 at 2). When either situation occurs, the partner must be sent home immediately. (Resp. Ex. 41 at 2).

On March 20, Alydia Claypool was scheduled to work from 5 a.m. to 1 or 2 p.m. (Tr. 557). Claypool arrived at the 75th Street store with barista Hope Gregg around 4:45 a.m. to 4:50 a.m., 10 to 15 minutes before the start of her scheduled shift. (Tr. 557, 621). Upon arrival, Claypool turned off the alarm, clocked in, and completed the COVID check-in process. (Tr. 558). According to Claypool, she completed her COVID check-in within one or two minutes after clocking in for

the day and before completing any of the opening procedures. (Tr. 621). Claypool failed two separate aspects of the COVID check-in process on March 20. First, Claypool failed the COVID Coach questionnaire because she was experiencing two symptoms of COVID-19, namely, body aches and a headache, rendering her ineligible to continue working. (Tr. 559-60, 621). Next, Claypool failed another separate step of the COVID check-in process when she took her temperature and registered a fever of 100.4 degrees. (Tr. 559, 621; GC Ex. 25). Claypool retook her temperature several times to confirm the temperature reported was accurate. (Tr. 559). Claypool then completed the paper log recording her temperature and marking herself as ineligible to continue working. (Resp. Ex. 41).

Claypool testified she knew from the policies that if she failed COVID Coach, she could not work. (Tr. 622). She further testified she knew she had to leave the store. (Tr. 622). Claypool admitted she had failed the COVID check-in process previously, on January 5, and immediately left the store in that instance. (Tr. 623, 651; Resp. Ex. 42).

On Wednesday, January 5, Hannah Edwards, the shift supervisor on duty, made a notation in the 75th Street store's Daily Records Book stating, "Alydia failed covid coach and left." (Resp. Ex. 42). At the hearing, Jenkins authenticated several entries from the 75th Street Store's Daily Records Book as business records regularly kept in the ordinary course of business (Tr. 1258, 1305). Jenkins explained the Daily Records Book is "a book in store that holds store communication from notes, such as this, but it also holds station assessments, food temperatures, milk temperatures. It's essentially a log of our day-to-day operations." (Tr. 1258). Excerpts of the 75th Street's Daily Records Book (DRB) were first introduced as Respondent Exhibit 43 with no objection from any party. However, when Respondent sought to introduce a second page from the DRB that General Counsel viewed as not helpful to its case, General Counsel suddenly objected

to the records on hearsay grounds and sought to prevent the witness from testifying regarding the business's regular practices with such records. However, Judge Amchan correctly overruled the General Counsel's arbitrary objection to the introduction of the second page of a previously accepted document that was already in the record. (Tr. 1305-06; Resp. Ex. 42).

Claypool confirmed she was familiar with Starbucks' COVID-related policies. (Tr. 620). In fact, Claypool testified completing the COVID check-in procedures has become habit over the last two years. (Tr. 558, 621, 1303; Resp. Ex. 41). Claypool testified she has completed the COVID coach during 98% of her shifts worked over the last two years. (Tr. 620, 623). Claypool testified she cannot remember a specific day where she would not have completed the COVID Coach, but she imagined that at the beginning of COVID she might have forgotten to do it early on. (Tr. 620-21). Moreover, Claypool testified others at the 75th Street store had failed the COVID check-process in the past, resulting in temporary store closures or modified hours, including on February 8 and 9. (Tr. 622-23, 650). Clearly, then, Claypool was well aware of her obligation to leave the store immediately after failing the COVID check-in process.

However, Claypool did not immediately leave the store. (Tr. 560, 622). Instead, Claypool began completing the store's opening procedures with barista Hope Gregg while she attempted to reach Store Manager Jen Seymour. (Tr. 560, 622). Claypool testified she chose to keep working because she "was assuming" her temperature was not caused by COVID-19 and was not contagious. (Tr. 560). However, nothing in any Starbucks policy or past practice allows a partner to decide arbitrarily when their symptoms are or are not associated with COVID-19, and the General Counsel produced no evidence supporting such an inference. (Resp. Exs. 5, 41). Claypool further testified she did not leave the store because she did not want to leave Gregg alone in the store. (Tr. 568-69, 651-52). In support of this argument, Claypool testified the practice at each

location, including 75th Street, was not to permit baristas to remain in the store alone, quoting selective language from the Store Operations Manual. (Tr. 569-71). Claypool testified the Store Operations Manual is "a manual for different things like safety, different procedures. It's something that all Shift Supervisors have access to and I believe all baristas as well." (Tr. 570; GC Ex. 40). Contrary to Claypool's representations, the Store Operations Manual provides a procedure for how to obtain approval in circumstances like the one she found herself on March 20 and neither were utilized. The full policy set forth in the Store Operations Manual provides:

> All stores must open with a minimum of two partners. Partners who are opening should enter the store together. If it is unsafe for an opening partner to wait outside the store alone and there is no alternative safe place to wait (such as the partner's car or a nearby open business), a partner may enter the store alone. In that instance, the partner should communicate any concerns *to their district manager*. Single entry into closed stores is not regularly permitted except in pre-approved situations which require approval *by the district manager*.

GC Ex. 40 at 3 (emphasis added). Here, Claypool never contacted Jenkins, the district manager. Instead, she chose to ignore the procedures as she tried to convince the new Store Manager to permit her to continue working despite having failed the COVID check-in procedures. (Tr. 622-23).

Although the substance of two phone calls is disputed, the sequence of events on March 20 is largely undisputed. Both Claypool and Seymour testified Claypool first tried calling Seymour around 5:15 a.m., about thirty minutes after arriving at the store, and left a voicemail. (Tr. 560, 623, 1538). When Seymour did not answer, Claypool texted her at 5:17 a.m. (Tr. 560; GC Ex. 25). The sound of the text message woke Seymour, who testified she found out Claypool had failed the COVID procedures at that time. (Tr. 1538, 1552).

According to Seymour, she called Claypool twice that morning. (Tr. 1550). The first call occurred around 5:25, within eight minutes of receiving the text from Claypool. (Tr. 1541).

According to Seymour, Claypool told her on the phone she had failed the COVID coach, had a temperature, and was experiencing a couple of the COVID symptoms. (Tr. 1538). Seymour testified that during the first phone call she told Claypool she could not continue working. (Tr. 1552). Seymour testified Claypool replied she knew she was not supposed to stay in the store but she had continued working after failing the COVID coach. (Tr. 1538). Claypool then explained she had another partner with her and was, as a result, unsure what she should do. (Tr. 1538). Seymour testified she asked Claypool if she had reached out to any other partners and told Claypool to use the COVID Coach app to log her symptoms and input her vaccination status. (Tr. 1538). Seymour further testified during the first call she told Claypool she needed to log into Partner Resources, file the report, and then leave. (Tr. 1552). Seymour testified she was not 100 percent sure at the time as to the procedure for logging vaccination status when someone failed COVID coach. (Tr. 1538). According to Seymour, Claypool then logged into Partner Hub to make sure her vaccination status was registered there. (Tr. 1538-39). The COVID coach again confirmed Claypool needed to go home. (Tr. 1539). Seymour testified she then told Claypool and Gregg to leave the store. (Tr. 1539).

According to Seymour, Claypool had not yet opened the store at that point. (Tr. 1539). So Seymour believed that all Claypool needed to do was to secure the store and leave. (Tr. 1539). Seymour told Claypool and Gregg she would get to the store as soon as she could. (Tr. 1539). Around 5:49 a.m., Claypool sent Seymour several text messages. (Tr. 1552; GC Ex. 25). In response to those texts, Seymour called her and told her she needed to secure the store and leave. (Tr. 1552; GC Ex. 25). Seymour testified she then called Claypool a second time just before 6:00 a.m. and reiterated she needed to leave the store immediately. (Tr. 1550, 1552). About fifteen to twenty minutes later, at 6:15 a.m., Claypool finally clocked out and left the store. (Tr. 1552).

Claypool testified Seymour only called her once that day at some time before 5:49 a.m. (Tr. 562, 563). Claypool said she explained to Seymour her belief she was sick but that her temperature and symptoms were from her visible sunburn, and the two discussed what the next steps were in terms of whether she needed to leave the store and isolate. (Tr. 562-63). Claypool said Seymour told her to log into the back-of-house computer and look for a new application for disclosing vaccine status, as well as COVID test results, and there was another test on that website or on an application that Claypool could use to help determine whether she needed to isolate. (Tr. 563). Claypool said she then got off the phone and attempted to find the application and sign on. (Tr. 563). At 5:49 a.m., Claypool texted a photo and a message to Seymour because Claypool "was having trouble finding the test that [Jen] was prompting [her] to on the new COVID application, so [she] was trying to get clarity as to where [she] needed to go on there." (Tr. 564). Claypool said in the 5:49 a.m. text she was trying to show Jen "the welcome page that [she] had signed into with [her] partner numbers and that it wasn't like prompting [her] to go to any sort of tests to figure out if [she] was eligible to work." (Tr. 564). Claypool testified she was confused by the new COVID application. (Tr. 564). However, she also testified the new application did not launch until April 4, after the events in question took place. (Tr. 624). Claypool testified Seymour never told her to close the store and leave prior to 5:53 a.m. (Tr. 565). At 5:54 a.m., Claypool told Seymour she would text two of the other shift supervisors to see if they could come in. At 5:59 a.m., Claypool texted a group chat with other shift supervisors to see if anyone else could come in. (Tr. 566-68; GC Ex. 39). According to Claypool, after sending the 5:59 a.m. text, she then had to go through the process of closing the store because "[a]t the time, [she] was in between doing all this, Barista Hope was opening the store[,]" "brewing coffee," and "doing the opening tasks." (Tr. 566).

The rest of the events which followed the above are not disputed. Later that day, Seymour texted Claypool and asked if she wanted to use sick time for the day. They discussed Claypool getting a COVID test to prove that she was negative and eligible to come back to work. (Tr. 572; GC Ex. 25). Claypool obtained a COVID test and returned to work after her negative test on March 22, two days after the events summarized above. (Tr. 572-73).

On Monday, March 21, Seymour testified she noticed Claypool's records while reviewing the store's timesheets because Claypool's timesheet showed she had remained clocked in for over an hour on the Sunday; Seymour thought she had told Claypool to leave the store immediately. (Tr. 1539). The timesheets showed Claypool had remained in the store until 6:15 a.m., more than an hour after arriving in the store and failing the COVID coach. (Tr. 1539). At the time, Seymour sent the information to Jenkins, who then sent the information on to Partner Resources to initiate an investigation. (Tr. 1539).

Starbucks has consistently enforced its COVID check-in procedures over the last two years. The Partner Pre-Check Log for the 75th Street Store shows partners consistently completed them for every shift. (Tr. 1303; Resp. Ex. 41). Jenkins testified she had separated another partner, a store manager in fact, in February 2021 for a violation of the COVID check-in policy like the one Claypool committed when the store manager came to work on December 26, 2020, did not pass the COVID coach, but then remained for a period before leaving the store. (Tr. 1304; Resp. Ex. 17).

Starbucks' commitment to following its COVID check-in procedures is so well-established that it applies those protocols to events taking place outside its stores. For example, in the March 3 audio recording of the meeting at the hotel (General Counsel Ex. 28), Jenkins can be heard asking the partners to take their temperatures, and a thermometer beep can be heard shortly after each

additional partner arrives at the meeting. (GC Exs. 28, 51). Claypool herself testified the COVID check-in procedures were so routinely followed they had become habit. (Tr. 558, 621, 1303).

According to Seymour, Partner Resources conducted its investigation and recommended separation for Claypool. (Tr. 1539). Jenkins followed that recommendation and decided to terminate Claypool. (Tr. 1590). On March 28, Seymour and Bellis met with Claypool to deliver her separation notice. (Tr. 573-75, 577-78; GC Ex. 26).

The following week, Claypool called the Partner Contact Center to appeal her separation decision. (Tr. 577). Starbucks' Partner Contact Center is a third-party entity upon which Starbucks relies to conduct independent reviews of employment decisions. (Tr. 576-77, 1539). The Partner Contact Center completed Claypool's appeal and decided to reinstate Claypool with full backpay on May 2. (Tr. 577; Resp. Exs. 37, 39). The next day, a Partner Resources Manager named Bear Orozco filed an MSS Form on behalf of Claypool stating her separation had been reversed and restoring her to her prior position with her prior seniority, pay, and benefits. (Resp. Ex. 39). In her testimony Claypool confirmed that following her appeal, she was offered full backpay and told all her benefits would go back to normal, as if she was never terminated. (Tr. 578; Resp. Exs. 37, 39). Respondent Exhibit 37 confirms Claypool received $3,254.40 in backpay following her reinstatement. (Resp. Ex. 37).

Starbucks made an announcement to the employees at the 75th Street store notifying them of Claypool's reinstatement. (Tr. 1550). Seymour likewise confirmed she let the team know Claypool would be returning to her prior position as a Shift Supervisor. (Tr. 1550). It follows that during the hearing, Claypool was back working in the 75th Street store for Starbucks. (Tr. 1540).

19. March 15th Incident Involving Hannah McCown

Paragraphs 31(a)-(b) of the Complaint allege that after March 15 Starbucks reduced

McCown's scheduled hours per week and failed to abide by its supposed scheduling commitments to her. However, no record evidence indicates Starbucks reduced McCown's hours.

To the contrary, the testimony and exhibits confirm that by March 15, McCown had already reduced her availability to just weekend and evenings after 5:00 p.m. Notably, McCown did not respond to Doran's request for coverage for Doran's evening shift on March 23 despite the shift falling squarely within the hours McCown alleges she was available to work but management supposedly refused her. (GC Ex. 20). Indeed, during the weeks after March 15, on the days when McCown was scheduled, McCown showed up late and left early with no notice to the Store Manager. (Resp. Ex. 36). On one shift, McCown informed Doran she was having a mental breakdown and needed to leave immediately, but later she changed her story and claimed she needed to leave because she had begun experiencing Covid symptoms. (GC Ex. 20; Resp. Ex. 36). Despite McCown already having a Final Written Warning, Starbucks only issued a documented coaching to McCown for leaving work early without notice. Starbucks had justification for separating McCown over the above infraction, but it did not do so. (Resp. Ex. 36). On March 26, with Seymour present, Bellis delivered the documented coaching to McCown. (Tr. 1452; Resp. Ex. 36).

20. March 22nd Hannah McCown Documented Coaching

On March 20, though not scheduled to work that day, Seymour awakened and drove to the store to meet Gregg after ordering Claypool to leave work. (Tr. 1539). Seymour planned to remain at the store with Gregg for a few hours, until McCown arrived for her 10:30 a.m. shift, so the store could remain open and Gregg would not be left alone in the store.

When McCown did not arrive at her scheduled time, Seymour called her to remind her to come in for her shift. (Resp. Ex. 36). McCown arrived an hour and a half later, around 11:56 a.m.,

completed the COVID check-in procedures, and began working her shift. (Resp. Ex. 36). Around 3:00 p.m., without speaking to Seymour, McCown told Doran her reason for leaving early had nothing to do with COVID. Instead, as noted above, McCown claimed at the time "she was having a mental breakdown so she was leaving early." (GC Ex. 20 at 5). When Seymour approached McCown thereafter regarding her failure to report timely for her shift and leaving her shift early, without communicating with Seymour, McCown claimed she had left because she did not pass COVID coach, had developed a sore throat and body aches, and needed to leave early–an entirely different and far more serious reason than she had explained to Doran. (Resp. Ex. 36). Due to her shifting explanations, Bellis suspected McCown of lying to justify leaving early without permission. (Tr. 1487-88).

21. March 26th Maddie Doran Final Written Warning

Every Starbucks store has one designated "Cash Controller" at all times. (Tr. 1344, 1590; Resp. Ex. 8 at 8). "The person responsible for performing cash management activities (e.g., counting the safe, completing deposits, etc.) throughout the shift is known as the Cash Controller. Only the Cash Controller is authorized to perform the Cash Controller activities at any given time." (Resp. Ex. 8 at 8). When closing the store, the Cash Controller (or closing shift supervisor) must par the till, count the safe, and build and finalize the deposit. (Tr. 1515-16; Resp. Exs. 8, 78). While completing the safe and till counts, the Cash Controller must take steps to identify cash shortages and overages (i.e., "variances"). (Tr. 1343-44, 1515; Resp. Ex. 8 at 18). "Any discrepancies over $20 must be reported to both the store manager and the district manager by the Cash Controller on duty for further investigation." (Resp. Ex. 8 at 18; Tr. 1345-46, 1585). Once finalized, the Cash Controller must also record all deposits in the courier log before placing them into the safe. (Tr. 1296, 1520, 1547-48; Resp. Ex. 8 at 16).

Starbucks contracts with Garda for courier services to pick up deposits, change order payments, and deliver change orders. (Resp. Ex. 8 at 16). The courier log is used to shift liability from Starbucks partners to the courier for any deposits lost while in transit to the bank. (Tr. 584; Resp. Ex. 18 at 5, 6). When a courier picks up deposit bags, the Cash Controller must obtain a signature from the courier on the log next to the entry for each deposit bag collected. (Tr. 1296, 1520-21; Resp. Ex. 8 at 17; Resp. Ex. 18 at 5, 6). That way, if the amount does not reach the bank and become a verified deposit, Starbucks can shift liability for the missing money off its partners and on to the courier. (Tr. 584; Resp. Ex. 18 at 5, 6). The Cash Controller is also responsible for updating the cash management system to mark those deposit bags as "picked up by carrier." (Tr. 1516; Resp. Ex. 8 at 17). The deposit bags will remain in "picked up by carrier" status unless and until the bank confirms receipt of the deposit and additionally verifies that the amount of the deposit bag's contents counted matches the amount printed on the finalized deposit slip. (Tr. 1297, 1516). Any discrepancy between the amount verified by the bank and the amount recorded as the finalized deposit number by the Cash Controller will be reflected in the system as a bank variance (whether an overage or a shortage). (Tr. 1297, 1516).

During the investigation into the store's unverified deposits, Jenkins became aware of at least one missed deposit entry in the courier log and four substantial cash variances [exceeding $50] within the previous 60-day period. (Tr. 1294, 1584). All four variances involved cash shortages and occurred on shifts when Doran had completed the Cash Controller duties at close. (Tr. 1294, 1584). Specifically, Jenkins learned the deposits from the following dates were short by the following amounts: 12/07/2022 (-$68.78), 01/09/2022 (-$150.66), 01/11/2022 (-$94.80), and 02/10/2022 (-$64.55). (GC Ex. 21).

Upon learning of the cash shortages and missed courier log entry, Jenkins sent all the information to Kimberly Harris in the Partner Resources Department for further investigation. (Tr. 1585-86). Notably, multiple cash shortages of more than $20.00 for a single store are exceedingly rare and considered substantial violations of Starbucks policies. (Tr. 1293; Resp. Ex. 8). Jenkins felt these substantial policy violations, along with the negligence surrounding Doran's handling of the registers, not completing the courier log, and not managing the cash handling process properly, showcased Doran's inability to perform the shift supervisor job. (Tr. 1585). However, because Jenkins felt poor leadership under former Store Manager Madison Leeper could have largely contributed to Doran's overall cash handling negligence, Jenkins decided to issue a final written warning to Doran to give her an opportunity to address the conduct and improve (rather than separate her). (Tr. 1585). Partner Resources agreed with Jenkins's request for a final written warning for Doran. (Tr. 1586).

Shortly thereafter, Jenkins became aware of an additional scheduling integrity issue for Doran warranting a corrective action. Specifically, in mid-March, Doran had failed to obtain coverage for an upcoming planned absence in violation of Starbucks policy. (GC Ex. 21). Starbucks's Attendance Policy provides, in relevant part:

> **Responsibility for Finding a Substitute**: Planned time off, such as for a vacation day, must be approved in advance by the manager. ***If a partner will be unable to report to work for a scheduled shift and knows in advance, it is the partner's responsibility to notify the store manager or assistant store manager and for the partner to arrange for another partner to substitute***.
>
> In the event of ***an unplanned absence***, e.g., the ***sudden onset of illness, injury or emergency***, or when the partner is using paid sick leave allowable by law, the partner will not be held responsible for finding a substitute. The partner is still responsible for notifying the store manager or assistant store manager (or partner leading the shift if the manager is not in the store) of the absence prior to the beginning of the shift so coverage can be arranged if needed.

(Resp. Ex. 5 at 1) (emphasis added). Seymour testified once a schedule is posted, partners are responsible for finding coverage for their shifts if they will be unable to work an assigned shift. (Tr. 1521). Seymour further explained partners should call the store within two hours before their shift begins if they are unable to come in for a scheduled shift. (Tr. 1521). If a partner is sick, then the shift supervisor in the store assumes responsibility for covering the partner's shift. (Tr. 1521-22, 1548). However, if the partner knows ahead of time they will be unable to work an assigned shift, it is the partner's responsibility to find coverage for their shift. (Tr. 1521-22).

Seymour explained Doran had already scheduled two days of time off for a dentist appointment. (Tr. 1522). However, Doran then indicated she required a third day off after the schedule had been finalized with her having only two days off. (Tr. 1522-23). As a result, Seymour told Doran she would need to try to get the third day's shift covered herself if she wanted to take a third day off. (Tr. 1523). Doran was unable to get anyone to cover her closing shift for that third day off that she had requested. (Tr. 1523). Just before her shift was scheduled to begin, Doran called Seymour and let her know she had not found anyone to cover her shift, and the store was forced to close early. (Tr. 1523).

Seymour notified Jenkins to let her know the store would be closing early. (Tr. 1522). Jenkins in turn notified Partner Resources and handled the documentation addressing the call-off issue, as well as the documentation surrounding the negligent cash handling issues for Doran. (Tr. 1522). Seymour testified Jenkins also took part in the decision to discipline Doran for failing to get her shift covered and handled the documentation for the Final Written Warning. (Tr. 1522). Rather than separate Doran for a single scheduling integrity issue unrelated to her cash handling issues, Jenkins instead decided to include the scheduling issue in Doran's Final Written Warning, which Bellis and Neese delivered to Doran on March 26. (GC Ex. 21).

22. April 5th Lawful Termination of Maddie Doran

Doran was the closing shift manager on March 28. (Tr. 1524, 1586; GC Ex 22). The 75th Street store has two windows: a drive-up window and a walk-up window. (Tr. 1524; Resp. Ex. 63). The closing shift supervisor is responsible for ensuring both windows are locked and secured by the lowering of a metal bar across each window, which is then locked in place to prevent anyone from opening the window from outside the store. (Tr. 1524). Leaving the store's windows or doors unlocked is considered a significant violation of Starbucks policies. (Tr. 1586).

The next morning, March 29, Seymour and a partner named Allison (or "Ally") McCoy opened the store. (Tr. 1524). When they arrived, Seymour and McCoy found both windows unlocked, and the metal bar was not in place on either window. (Tr. 1524-25, 1586). At the hearing, Counsel for General Counsel stipulated into the record the surveillance video from the night of March 28 and agreed it did not show Maddie Doran ever locking the store's windows. (Tr. 1545). Accordingly, it is undisputed Doran left the two windows unlocked and unsecured on March 28 when she closed the 75th Street store. (Tr. 1545).

At that time, both Seymour and McCoy wrote statements regarding how they found the windows unlocked that morning. (Tr. 1524-26, 1555; Resp. Ex. 22). Seymour also took photos of the windows, and Seymour then sent the photos and the written statements to Jenkins and Partner Resources for further investigation. (Tr. 1524-26, 1555; Resp. Ex. 22). After completing its investigation, Partner Resources recommended separation based on Doran's Final Written Warning. (Tr. 1525). Ultimately, Jenkins decided to terminate Doran. (Tr. 1586).

Seymour testified Partner Resources made the decision to separate Doran. (Tr. 1525-26). She further testified "Partner Resources ultimately makes the decisions on separations." (Tr. 1526). However, Jenkins's testimony contradicted this statement. (Tr. 1586, 1590-92). Further, Seymour

admitted she did not know what involvement or participation Jenkins had in the decision to discharge Doran. (Tr. 1526-27). Although Jenkins seeks input and guidance from Partner Resources, Jenkins testified she (not Partner Resources) ultimately makes decisions to terminate partners within her district. (Tr. 1586, 1590-92).

Jenkins testified she believed Doran did not have the ability to handle cash and to be a leader in an effective way in the store. (Tr. 1586, 1590-92). Jenkins felt the concerns raised by Doran's policy violations could not be ameliorated simply by demoting her from shift supervisor to barista because all partners at Starbucks handle money and are responsible for maintaining the safety and security of the store. (Tr. 1592). Regarding leadership, Jenkins testified Doran, as a shift supervisor, was responsible for ensuring all closing tasks are properly performed, either by performing those tasks personally or ensuring they were delegated and completed. (Tr. 1592). Moreover, Starbucks has consistently terminated partners for failing to lock the store's windows, long before any organizing activity began at Starbucks. (Resp. Ex. 66). Therefore, Jenkins concluded Doran's termination was warranted under the circumstances. (Tr. 1586, 1590-92). On April 5, Seymour delivered Doran's separation notice along with Jacqueline Neese, another store manager who accompanied Seymour as a witness. (Tr. 1526-27; GC Ex. 22). Doran, as did Claypool, internally appealed her discharge claiming retaliation based on her purported protected activities. (Tr. 801-05). A third party reviewed and denied her appeal. (Tr. 805).

23. Hannah McCown Quits Via Text Message

McCown delivered her resignation notice via text message. (Tr. 1453-54; 1537). McCown's text indicated she would not be coming back to Starbucks and said that she was fearful of being discharged. (Tr. 1540).

C. Country Club Plaza Store (Store 2326) Allegations

The Country Club Plaza Store (Store 2326) (referred to as the "Plaza" store throughout the proceedings) is a café-only retail store located in a well-known upscale shopping district at 302 Nichols Road in Kansas City, Missouri. (Tr. 961, 985; GC Ex. 36).

The Plaza Store Manager is Eric Schmidt. (Tr. 961, 986). Schmidt testified regarding his long history with Starbucks. (Tr. 1380-82). Currently, he oversees roughly thirty-two partners at the Plaza store. (Tr. 961, 1382). According to Schmidt, store managers must execute all operational and leadership responsibilities within the store. (Tr. 1382). Schmidt also testified regarding additional duties he performs as a store manager trainer, such as training new store managers on the overall execution of all store manager responsibilities. (Tr. 1382). Schmidt further testified he has only trained new store managers in his own store, enabling him to maintain his authority and oversight of his store even while he is training other store managers. (Tr. 1406). Store Manager Schmidt reports to District Manager Ellie Grose. (Tr. 986).

On February 2, the Union filed its petition in Case No. 14-RC-289930 seeking a mail-ballot representation election for "[a]ll full-time and regular part-time Baristas and Shift Supervisors" at the Plaza store. (GC Ex. 36). Starbucks disputed the appropriateness of the petitioned-for single-store unit, arguing only a district-wide unit was an appropriate unit. On February 24, Region 14 conducted a pre-election hearing regarding the appropriateness of the unit. Both sides presented documentary and testimonial evidence and submitted lengthy post-hearing briefs. On May 3, Region 14 issued its Decision & Direction of Election directing a mail-ballot election to take place on June 9. *See Starbucks Corp.*, Case No. 14-RC-289930 (DDE, May 3, 2022). The Union filed objections on June 16, which remain pending. Currently, the outcome of the election remains unresolved pending a decision on the outstanding objections and challenges.

1. District Manager Ellie Grose's Meeting with Addy Wright.

In mid-February, shift supervisor Addy Wright, who had worked at the Plaza store for approximately 3 years, approached Store Manager Schmidt to complain about safety and security issues at the Plaza store. (Tr. 985-87). Wright raised concerns regarding several incidents involving unruly customers at the store. (Tr. 987). Schmidt asked Wright if she would like to speak with his boss, District Manager Ellie Grose, about her concerns. (Tr. 987). Wright expressed interest in meeting with Grose, and Schmidt reached out to Grose to let her know. (Tr. 987).

On or around February 23, Grose visited the Plaza store to meet with Wright about her safety concerns. (Tr. 988). The meeting lasted fifty minutes. (Tr. 988). During the meeting, Wright expressed her safety concerns and asked for a pay increase, stating she did not believe she was paid sufficiently to deal with such safety issues. (Tr. 989; Tr. 1374, 1379).

Grose credibly testified she responded by acknowledging the pending petition at the store and explaining that through the collective bargaining process wages could go up, down, or stay the same. (Tr. 1379). Wright asked whether the process described was unique to Starbucks. (Tr. 1005). Grose replied the process was not unique to Starbucks but was generally applicable to all companies engaging in the collective bargaining process. (Tr. 1005). Wright testified she told Grose she was educated regarding the process and no longer wished to speak about the pending petition. (Tr. 991).

During her testimony, Wright acknowledged stating in her affidavit Grose told her "I am aware of your petition to unionize. The company will support you and your decisions." (Tr. 1004). Wright also testified she perceived Grose as sympathetic to her during the conversation as well as overall with respect to the points Wright raised about why unionization was necessary for the work force. (Tr. 1004).

Separately, Grose's statements regarding the collective bargaining process were corroborated by educational materials posted in the back of the store throughout the campaign, stating *inter alia*: "Workers United cannot guarantee you get anything specific in bargaining. In fact, no one knows what will happen in bargaining. You *could* get more, you *could* get less, or things *could* stay the same." (Tr. 1400; Resp. Ex. 75).

2. Dress Code Enforcement at the Country Club Plaza Store

Starbucks has consistently enforced its dress code policy at the Plaza store. Schmidt testified regarding his past practice relating to dress code enforcement at the store, including conversations held with all his employees at two recent storewide meetings. These meetings, referred to as period promotional planning (or "PPK") meetings, take place six times a year. (Tr. 1383). Although these meetings largely focus on dissemination of promotional materials, such as new beverage information, new food information, other company training, and other operational information (Tr. 1384), Schmidt testified it was also common for him to discuss other topics including enforcement of the dress code policy. (Tr. 1384).

The first PPK meeting about which Schmidt testified took place on November 3, 2021. (Tr. 1394). Schmidt reviewed three specific policies from the Partner Guide in detail during that meeting: the time and attendance policy, the illness policy, and the dress code policy. (Tr. 1385). Schmidt read the entire dress code policy to the partners during that meeting. (Tr. 1385). Schmidt then handed out copies of the dress code policy to each partner. (Tr. 1386). Schmidt had written each partner's name in the top right corner of each policy. (Tr. 1386). Schmidt told each partner to review the distributed copy of the dress code policy and, after doing so, to sign and return the documents to him within the following two weeks. (Tr. 1386). Upon receipt of the signed policies, Schmidt placed each signed copy of the dress code policy into each partner's respective personnel

file, which he maintained as physical files kept at the store in the ordinary course of business. (Tr. 1394). At trial Schmidt authenticated each of the signed dress code policy documents returned to him, several of which included dates corroborating Schmidt's testimony. (Tr. 1387-1394; Resp. Ex. 71).

Schmidt also testified regarding another PPK meeting held on February 22, at which he again discussed the dress code policy. (Tr. 1395). Schmidt described the dress code discussion at the spring PPK meeting as a "a review and follow up on dress code." (Tr. 1395-96). Schmidt testified that he discussed several of the common problem issues he had been seeing in the store, such as not wearing clothes within the designated color palette; wearing jewelry such as watches, bracelets, and rings; messy aprons; and missing name tags. (Tr. 1396). At no point during the spring PPK meeting did Schmidt threaten to enforce the dress code policy more strictly than he had previously enforced it in the past before there was organizing activity at the Plaza store. (Tr. 1399). It follows that Counsel for General Counsel failed to meet its burden of showing that Schmidt threatened to enforce the dress code policy more strictly in response to organizing activity at the Plaza store.

Regarding actual enforcement of the dress code policy, Schmidt testified regarding only one occasion in the summer of 2021 at the Plaza store in which he recalled issuing written discipline for violating the dress code policy when a partner wore crop top shirts and jewelry. (Tr. 1396-97). Schmidt also recalled issuing written discipline in 2014 at his prior store in Wichita, Kansas for messy aprons and missing nametags in violation of the dress code. (Tr. 1397-98). Schmidt testified he has never changed the way he enforces the dress code. (Tr. 1399).

Finally, Schmidt testified regarding his practice of relying on his shift supervisors and assistant store manager to hold others accountable to the dress code through verbal coaching. (Tr.

1402). Schmidt relies primarily upon shift supervisors to enforce the dress code; he has only had an assistant store manager in the Plaza store since December 2021. (Tr. 1402). Schmidt testified about having coached shift supervisors in the past for failing to hold others accountable for dress code violations, as it is part of their duties and responsibilities to do so. (Tr. 1402). However, Schmidt clarified that he alone handles the issuance of any written discipline for dress code policy violations when they arise. (Tr. 1402).

In its case in chief, General Counsel relied solely on Noel Christopher "Chris" Fielder's testimony to argue Store Manager Schmidt more strictly enforced the dress code after the filing of the petition at the Plaza store. Notably, Counsel for General Counsel did not ask Wright, the more tenured employee witness from the Plaza store, any questions about enforcement of the dress code policy at the Plaza store.

Counsel for General Counsel called only two witnesses regarding the allegations pertaining to the Plaza store: Fielder and Wright. Fielder is a barista who began working at the Plaza store in November 2021, a few months before the filing of the petition. (Tr. 960-61). Wright is a shift supervisor who began working at the Plaza store almost three years ago. (Tr. 985-86).

Fielder testified he never witnessed issuance of written discipline for any dress code infraction at the Plaza store. (Tr. 968). The allegations regarding the Plaza rest upon Fielder's conclusory statements about noticing the Assistant Store Manager, Heather Neal, starting to enforce the dress code in mid-March. (Tr. 976). When pressed for specifics, Fielder could only identify two instances in which individuals received verbal coaching about dress code infractions. For one coaching, Fielder witnessed Neal counsel a barista named Dean Chavez regarding Chavez's canvas shoes, which Chavez acknowledged were not within the dress code policy. (Tr. 968). However, Fielder admitted he had no personal knowledge of any discipline stemming from

the alleged incident. (Tr. 968, 982).

Fielder testified about one other specific coaching he could recall that had taken place months after the filing of the unfair labor practice charge alleging stricter enforcement of the dress code policy. This incident took place a week before the hearing began when Fielder wore to work a tee shirt bearing a large union logo knowing it was not within the dress code. (Tr. 976). Fielder explained he had never worn the tee shirt before and recalled receiving only a verbal coaching for wearing the allegedly non-compliant tee shirt.

Once more during his testimony, Fielder acknowledged having no knowledge of any written discipline issued for supposed dress code infractions. (Tr. 976, 980-81). General Counsel failed to meet its burden of proving Starbucks more strictly enforced its dress code policy at the Plaza store, let alone did so in response to union organizing at the Plaza store.

D. Lawrence Store Allegations

On March 28, 2022, the Union filed a petition for representation election seeking to represent all full time and regular part-time hourly Baristas and Shift Supervisors employed by Starbucks at its store located at 1731 W. 23rd Street, Lawrence, Kansas (the "Lawrence Store") (14-RC-293092). (GC Ex. 37). The parties subsequently entered into a Stipulated Election Agreement for a mail-ballot election. (Tr. 1016-17). The NLRB's Region 14 Subregional Office 17 mailed ballots on May 9 and tallied ballots on June 7. Neither party filed objections to the election, and the election results were certified on June 27.

1. April 29th Text Messages Regarding the Cup Calling Policy

Credible evidence establishes the existence and maintenance of a Starbucks policy on cup marking and drink calling. (Resp. Ex. 10 at 6). The policy provides "[t]o make sure our customers always feel welcome in our stores, Starbucks has zero tolerance for writing inappropriate or

offensive content on cups (for example, racial slurs) even if a customer asks you to do so." (Resp. Ex. 10 at 6). It instructs partners, "[i]f you are uncomfortable with a customer request to write something on a cup because it feels inappropriate, feel free to respectfully only mark the beverage on the cup." (Resp. Ex. 10 at 6). Additionally, it provides:

> If you feel uncomfortable with what is written on a cup, ask your manager or Play Caller to determine if the drink should be passed on to the customer as labeled. If you determine it should not be handed out to the customer, remake and relabel the drink using only the beverage name and feel free to just call the beverage written on the cup (e.g. "I have a Double Tall Latte.").

(Resp. Ex. 10 at 6).

Korbin Hogan, a barista from the Lawrence store, provided uncontradicted testimony regarding the cup calling policy at the store. (Tr. 1008-23). Hogan testified drinks have stickers printed out setting forth the drink, any modifications, and a name for the order. (Tr. 1014). When the drink is ready, the barista typically walks to the "hand-off plane" and shouts the name printed on the drink ticket. (Tr. 1014).

Hogan gave uncontradicted testimony that drink names only infrequently contain names suspected to be false. (Tr. 1014). Hogan recalled only a few specific examples: one from a week prior when someone had ordered a drink under the name Marilyn Manson, one from an unknown date roughly a year earlier when a drink was ordered under the name Wonder Woman, and his general recollection of customers using comic book names for their drink orders. (Tr. 1014). Additionally, Hogan recalled drinks ordered during the 2020 Presidential Election under the name "Trump 2020." (Tr. 1015, 1016, 1021-22). Hogan testified that the store manager texted shift supervisors during the 2020 election instructing them not to call out anything other than names or drink orders. (Tr. 1016, 1022).

Hogan provided further uncontradicted testimony regarding whether a partner must shout

a suspected fake name for a drink order, testifying "[i]t's up to my judgment." (Tr. 1015). When asked whether other baristas typically shout out suspected fake names, Hogan testified:

> It depends on the barista. They'll typically call out the name, but some of them are more embarrassed by the names that are like more obviously fake. So they'll either shout out the name of like the drink itself, or like the item itself. So it would be like (inaudible) Latte for the café.

(Tr. 1015).

Although Hogan initially testified he did not think any guidance existed regarding cup calling, he later corrected his testimony to acknowledge the existence of the cup calling policy: "[t]here might be guidance about not saying profanity, but I don't think it says anything about whether or not you—it doesn't say anything whether or not you judge a name to be like legitimate or not." (Tr. 1016, 1021-22).

Hogan testified during the event referenced in General Counsel Exhibit 33 on April 29, 2022, the partners remained outside the store handing out flyers. (Tr. 1018-19). Hogan testified another barista named Micah "would <u>suggest</u> to customers that they would change their name in the mobile ordering pay app to Union Strong or like Pro Union. And this was designed to create community support." (Tr. 1020).

Hogan testified having received a text message from the store manager the same day. (Tr. 1020). The text message said:

> In light of today's event, I just wanted to give a friendly reminder that by standard, we are not allowed to call out anything other than a name or drink when calling out MOP or café orders. If a customer insists on giving anything other than their name, we are to call out their drink and nothing else. We talked about this a while ago and I'm sure you all remember, I just want to make sure we all know how to coach our partners that might not know that.

(GC Ex. 34).

There is **no** record evidence whatsoever of anyone giving the name "union," anyone being

told not to say the word "union," or any evidence of anyone being told they could not discuss the union at the Lawrence store.

V. LAW AND ARGUMENT

A. Overland Park 75th Street Store Allegations

1. General Counsel Failed to Show Starbucks Unlawfully Promised Benefits to Discourage Union Support.

In Paragraph 25 of the Complaint, General Counsel alleged that in early February, Starbucks "granted employees benefits by installing a storage pod, removing overstock of product from the store, and announcing plans to create additional parking" because "the employees of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." (Third Consolidated Compl. ¶ 25(a)-(b)). However, there is no credible evidence supporting these allegations.

a. Parking Options

Starbucks started working on addressing the parking issues at the 75th Street store months before 75th Street store employees filed their representation petition. (Resp. Ex. 15). Indeed, the partners' letter announcing their petition acknowledged Jenkins's ongoing efforts to resolve their parking concerns and boldly declared "we **refuse** the options presented by our District Manager, Sara J., to park two blocks away from our store or walk across five lanes of busy traffic . . . ." (GC Ex. 5) (emphasis in original). Despite expressly acknowledging Jenkins's ongoing efforts to address parking, General Counsel argues Starbucks has unlawfully granted benefits to discourage Union support by "announcing plans to create additional parking." As outlined in painstaking detail above, Starbucks was working consistently on resolving the parking issues at this store long before any organizing began. Moreover, and notably, no additional parking benefits have been

conferred. Contrary to representations by General Counsel, the restriping did not add any additional spaces: it simply outlined those existing spots partners and customers were utilizing already behind the dumpsters. (Tr. 1588). Furthermore, even if restriping the parking lot did constitute a benefit, no section of the Act prohibits Starbucks from addressing ongoing matters with its partners that date back to before the petition just because a petition was filed and an election is pending. And even more, no provision of the Act prohibits Starbucks from conferring benefits during the critical period for legitimate business reasons unrelated to any desire to impact how its partners exercise their Section 7 rights. *See U.S. Cosmetics Corp.*, 368 NLRB No. 21 (2019) (employer did not violate Section 8(a)(1) by the timing of the announcement and implementation of a wage increase); *AdvancePierre Foods, Inc.*, 366 NLRB No. 133 (2018) ("While the Board must be alert to a conferral of benefits timed to discourage union support, a union's organizing interest and campaign is not padlock on an employer's ability to update and revamp its operations, including its wage structure—changes it would have made in the absence of union activity"). For all these reasons, the General Counsel's allegations surrounding the supposed promise of a parking benefit must be denied.

b. Overstock Removal and Storage

Likewise, Starbucks started working on addressing its overstock and storage issues at the 75th Street store years before store employees filed their representation petition. Where an arguable grant of benefit has occurred, the granting of such benefit to employees in the middle of union organizational activity "is not per se unlawful where the employer can show that its actions were governed by factors other than the pending election." *American Sunroof Corp.*, 248 NLRB 748, 748 (1980), *modified on other grounds* 667 F.2d 20 (6th Cir. 1981). General Counsel bears the burden of proving, by a preponderance of the evidence, "that employees would reasonably

view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation." *Southgate Village Inc.,* 319 NLRB 916 (1995). If General Counsel makes such a showing, the burden shifts to the employer to demonstrate a legitimate business reason for the timing of the benefit, such as by proving that the benefit was "part of an already established Company policy and the employer did not deviate from the policy upon the advent of the union." *American Sunroof,* 248 NLRB at 748; *see also Dynacor Plastics and Textiles,* 218 NLRB 1404, 1404-05 (1975) (relying on the fact that the respondent granted an additional half-day holiday for Christmas to employees at all of its locations in finding the grant was lawful); *Nalco Chemical Co.*, 163 NLRB 68, 70-71 (1967) (finding improvements to vacation and holiday benefits did not violate Sec. 8(a)(1) in part because improvements applied corporate wide). Here, the General Counsel has failed to meet her burden. *See Fresh Organics, Inc.*, 350 NLRB 309 (2007).

No section of the Act prohibits Starbucks from addressing ongoing matters with its partners dating back to before the petition just because a petition was filed and an election is pending. And, again, no provision of the Act prohibits Starbucks from conferring benefits during the critical period for legitimate business reasons unrelated to any desire to impact how its partners exercise their Section 7 rights. *See U.S. Cosmetics Corp.*, 368 NLRB No. 21 (2019); *AdvancePierre Foods, Inc.*, 366 NLRB No. 133 (2018) ("While the Board must be alert to a conferral of benefits timed to discourage union support, a union's organizing interest and campaign is not padlock on an employer's ability to update and revamp its operations, including its wage structure—changes it would have made in the absence of union activity"). For all these reasons, General Counsel's allegations claiming Starbucks unlawfully promised to confer benefits to discourage Union support by removing overstock and providing additional storage at the 75th Street store must be denied.

2. General Counsel Failed to Show Starbucks Unlawfully Solicited Grievances and Promised to Remedy Them to Discourage Union Support.

In Paragraph 5 of the Complaint, General Counsel alleged on January 29 Starbucks, through Jenkins, "by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity." (Third Consolidated Compl. ¶ 5). However, there is no credible evidence supporting this allegation.

Starbucks strives to maintain, and has done so since long before the petition was filed, an ongoing, two-way dialogue with its partners about concerns they raise. As explained above, Jenkins has always maintained open lines of communications with the partners in her stores and encouraged partners to reach out with any issues or concerns. Board law permits that dialogue to continue notwithstanding any union activity or election petition. It is well established "[a]n employer who has had a past practice and policy of soliciting employee grievances may continue to do so during an organizational campaign." *Naomi Knitting Plant*, 328 NLRB 1279 (1999) (citing *House of Raeford Farms*, 308 NLRB 568, 569 (1992)). Moreover, an employer does not engage in objectionable conduct by soliciting and promising to remedy employee grievances during a union campaign if the employer, both prior to the campaign and after, was willing to listen to its employees' complaints and respond to them. *See MacDonald Machinery Co.*, 335 NLRB 319 (2001).

Here, several witnesses emphasized the infrequency of Jenkins's visits in December 2021 and early January as proof Jenkins had suddenly changed her cadence in stores in response to the Union organizing at the 75th Street store. Crucially, these arguments overlook certain critical facts. Starting in early December 2021, Jenkins filled in as Interim Regional Director for Starbucks Area

68 overseeing ten district managers and roughly 120 stores. (Tr. 1162-63). During that time, she asked three of her high-performing store managers to assist her with managing the stores in her district. (Tr. 1164). For the 75th Street store, Jenkins relied upon Lindsey Mills to oversee Leeper and the 75th Street store. (Tr. 1164). During those months, Mills visited the 75th street store three times a week for a six-week period and communicated frequently with Leeper to ensure Leeper continued to make progress on her commitments for the store. (Tr. 1164-65, 1192-93; Resp. Ex. 67). Then, once her Interim Regional Director role ended in late January, Jenkins returned to her prior cadence for visiting the stores in her district. (Tr. 1163). Equally crucial, nothing about the increase in Jenkins's visits to the store after her stint as Interim Regional Director concluded involved solicitation of grievances to discourage Union support. Jenkins was merely doing what she had done for so long, prior to the petition, when she visited the store: inquiring of partners as to challenges or issues they faced and how the Company could assist in overcoming them. It follows that Starbucks did not unlawfully solicit grievances at the 75th Street store to discourage unionization.

3. General Counsel Failed to Show Bellis Threatened Employees with Stricter Enforcement of Company Policies Because of Their Union Activities.

In Paragraph 8 of the Complaint, General Counsel alleged Starbucks, through Drake Bellis, "threatened employees with more strict enforcement of company policies because of their union activities and/or support" at a shift supervisor meeting in early February at the 75th Street store and at his PDCs on February 14, 15, and 16 at the 75th Street Store and at the Shawnee Mission store. (Third Consol. Compl. ¶ 8). The evidence proves otherwise.

In analyzing whether statements made during a campaign violate 8(a)(1) of the Act, "[t]he test is whether the employer engaged in conduct which, it may be reasonably said, tends to interfere

with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). Violations do not turn on the speaker's motive or whether the employee relied on the statement, but instead whether the statement would interfere with a reasonable employee's free exercise of Section 7 rights under the Act. *See, e.g.*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991).

Unlawful threats to enforce rules more strictly must include words or gestures linking the threatened enforcement to the employees' protected activities. *See, e.g.*, *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995) (employer violated Sec. 8(a)(1) by informing employees, while waving proposed collective-bargaining agreement, that shop would be run "strictly by union rules"); *DHL Express, Inc.*, 355 NLRB 1399, 1402-05 (2010) (upholding finding of 8(a)(1) where manager told employee if the union prevailed in the upcoming election, the manager would be less flexible with his tardiness policy).

In *Miller Industries Towing Equipment*, credible testimony established a manager told employees "[w]e're pretty lenient now, but if this comes in, you know we'll all have to abide by rules, stricter rules pertaining to lunch and breaks." 324 NLRB 1074, 1084 (2004). The statement itself acknowledged the employer was currently lax in how it approached rules enforcement and then threatened stricter enforcement "if [the Union] comes in." *Id.* Similarly, in *Treanor Moving & Storage Co.*, 311 NLRB 371, 375 (1993), the Board upheld a finding an employer violated 8(a)(1) when a manager told employees it "used to let you guys get away with this kind of stuff" but "now you are union and you guys are playing your game and the company is going to have to play by their game." Yet again, then, the statements deemed unlawful threats contained words directly linking the threatened enforcement to the employees' union activities.

The evidence linking the threat to the employees' protected activities is crucial in distinguishing an unlawful threat from a statement predicting the effects of unionization based upon objective facts. In *Olympic Supply Inc.*, the Board explained the distinction when it upheld the finding of an unfair labor practice during a decertification campaign based upon credible testimony that a manager had told two employees "he would cease being lenient and have to be stricter if the Union continued serving as the bargaining unit's labor representative." 359 NLRB 797, 800 (2013). The Board reasoned that the manager's comments violated Section 8(a)(1) of the Act because they neither predicted the effects of unionization (as the Union was already certified as the employees' representative) nor addressed objectively the consequences of unionization that were beyond the Company's control. *Id.* Because the parties were already obligated to follow contractual provisions laid out in their collective bargaining agreement, the manager's threat to more strictly enforce rules could not be justified as an objective prediction of unionization. *Id.*

In the hours of audio recordings that are in this record, not one of Bellis's statements threatened stricter enforcement of the rules if the employees selected the Union. There is no evidence of Bellis making any conditional statements relating to his enforcement of Company rules (e.g., *if* you cease your union support *then* we will not enforce the rules as strictly). Nor is there any evidence Bellis threatened stricter enforcement of rules in response to employees' union activities.

Claypool initially testified Bellis threatened to more strictly enforce the Starbucks pin policy during the February 14 shift supervisor meeting. (Tr. 580). However, she then testified Bellis told partners they were "still allowed to wear the Workers United pin, but we could only wear one non-Starbucks pin." (Tr. 580). Claypool also testified Bellis did not strictly enforce the dress code policy with respect to pins, noting he told the partners they could also wear pronoun

pins, in addition to the Workers' United pin, and even purchased additional pronouns pins and distributed them to the partners. (Tr. 626). Another partner, Hope Gregg, testified Bellis stated during her PDC he would be more strictly enforcing the dress code generally, but when asked for specifics Gregg only recalled asking Bellis questions about how the policy applied to various clothing items that were not squarely prohibited by the policy and could not recall Bellis doing anything other than referring her to the policy's language in response. (Tr. 503-04). Notably, nothing in any of the partners' testimony claimed Bellis made any statements even implying enforcement of the policy was in response to the employees' union activities.

Bellis credibly testified that standards and rules are something he always discusses early in any stint involving his management of a new store. (Tr. 1428-29). He explained he consistently enforces "the big three" standards: time and attendance, phone usage on the floor, and dress code; and he further explained the steps he took to ensure that partners understood his expectations from the outset as he believes these standards are "very basic and easy to follow." (Tr. 1428-29). Again, consistent with his prior practice, Bellis conducted PDCs shortly after arriving at the 75th Street store in part to get to know the partners as well as explain his expectations of them as the interim leader in the store. (Joint Ex. 3). Bellis's actions had nothing to do with any of the employees' union activities. In fact, Bellis explained during his PDC with Edwards that holding partners accountable to standards is something he must do as a store manager and had nothing to do with any of the employees' recent union activities. (Joint Ex. 3 at 21:21).

Since there is no record evidence that Bellis threatened to enforce company rules and policies more strictly because of employees' union activities, General Counsel has failed to prove the Company violated Section 8(a)(1) as alleged in Paragraphs 8(a)–(d) of the Complaint and those allegations must be dismissed in their entirety.

4. General Counsel Failed to Show Starbucks More Strictly Enforced Work Rules at the 75th Street Store in Response to Union Activities.

In Paragraph 24 of the Complaint, General Counsel alleged "[s]ince about January 31, 2022," Starbucks has "more strictly enforced its policies including, but not limited to, dress code, the wearing of pins/buttons, and filling out the courier log" at its 75th Street store "because the employees . . . formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." (Third Consolidated Complaint ¶ 24(a)–(b)).

An employer violates Sections 8(a)(3) and (1) of the Act when it more strictly enforces its work rules in response to employees' union activities. *See, e.g.*, *Print Fulfillment Servs. LLC*, 361 NLRB 1243, 1245-46 (2014). In analyzing such claims, the Board applies its familiar *Wright Line* framework. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). *Wright Line* is a causation test, requiring proof by a preponderance of the evidence that an employee's union or other protected, concerted activity was a motivating factor in the employer's stricter enforcement of its rules. General Counsel has not—and cannot—show any violation of the Act occurred here for several reasons. First, there is no credible evidence showing the employer more strictly enforced its rules after January 31. In fact, the record is replete with evidence to the contrary. Second, any record evidence that might be deemed to indicate a change in how policies were enforced at the 75th Street store after January 31 also reveals that the change was attributable to the change in leadership at the 75th Street store. Therefore, General Counsel has not—and cannot—show causation. None of the partners' protected activities played any role in how policies were maintained or enforced at the 75th Street store. Since General Counsel has failed to prove

Starbucks violated the Act by more strictly enforcing rules at its 75th Street store, the allegations set forth in Paragraph 24 must be dismissed.

a. Dress Code

There is no record evidence showing the dress code policy was a new or modified policy created in response to union activities. Rather, uncontradicted evidence shows the dress code policy at Starbucks predated the arrival of any union activity at the 75th Street store. The dress code policy was admitted as General Counsel Exhibit 44 and Respondent Exhibit 6, and a poster summarizing the policy was admitted as General Counsel Exhibit 42. All three documents contain copyright marks from before 2022. Moreover, as explained in detail in Starbucks' Statement of Facts sections, *supra*, multiple witnesses testified regarding the policy's existence and enforcement (whether strictly or not) under previous leaders. Indeed, the language of Starbucks' dress code policy has remained virtually unchanged for more than ten years since it first withstood challenge in the Second Circuit Court of Appeals back in 2012. *See, e.g.*, *NLRB v. Starbucks Corp.*, 679 F.3d 70 (2d Cir. 2012). As such, the existence and maintenance of a written policy regarding discipline for dress code violations at the 75th Street store is an uncontradicted reality.

Starbucks has always enforced its dress code and has a right to continue to do so during an organizing drive. *See, e.g.*, *Hertz Rent-A-Car*, 305 NLRB 487, 487-88 (1991) (rejecting a disparate enforcement allegation where employer had record of ongoing, concrete steps to enforce the dress code).

The record is replete with specific, credible evidence of the dress code policy's enforcement at the 75th Street store prior to January 31. First, several partner witnesses testified they were familiar with the Starbucks dress code policy, described its content, or confirmed having received copies of the dress code policy in the Partner Guide provided to them at the outset of their

employment. (Tr. 73, 208, 237, 497-98, 578-80, 891-93). Several partners also recognized and identified General Counsel Exhibit 42 as a poster summarizing dress code that was posted inside the 75th Street store. (Tr. 73-74, 237, 891-92; GC Ex. 42).

According to several witnesses, prior store manager Leeper enforced the dress code policy while managing the 75th Street store. Vestigo testified "when it came to things like dress code, you know, [Leeper] would always be on top of people about that." (Tr. 469). Likewise, despite making conclusory statements claiming the dress code "had not been enforced at the 75th Street store," Culey then contradicted his conclusory remarks with specific, credible testimony concerning Leeper's enforcement of the dress code. (Tr. 893). Specifically, Culey recalled at least two separate instances in which Leeper reprimanded him for dress code violations, once for wearing a red shirt and the other time for wearing Vans. (Tr. 928). Culey further testified that he recalled Leeper issuing multiple verbal reprimands to him about his dress code violations, saying things like "don't wear that[,]" or "[i]f I see you wear it again[,] I'll be mad." (Tr. 894).

Culey's testimony regarding an alleged disciplinary document for a partner named Bailey is unreliable hearsay and not supported by any of the record evidence. (Tr. 894-95). Indeed, the inherent lack of reliability of Culey's testimony regarding written discipline *other partners* did or did not receive is evidenced by his testimony concerning McCown's corrective actions. Culey testified McCown's corrective actions did not concern any dress code violations: in fact, the testimonial and documentary evidence in the record directly <u>contradicts</u> his understanding. (*Compare* Tr. 894-95 *with* GC Ex. 7). As such, Culey's testimony regarding whether other partners received written discipline for dress code violations prior to January 31 should not be credited.

Even McCown admitted Leeper enforced the dress code policy to some extent: she just believed Leeper was more lenient in how she enforced it. (Tr. 238). McCown testified "[i]f

Madison [Leeper] would see someone wearing, ripped jeans . . . and it was against dress code she would tell someone." (Tr. 252). McCown further recalled witnessing Leeper reprimand Culey about wearing ripped jeans and telling him, "[y]ou can't wear those." (Tr. 252). Similarly, Hope Gregg initially testified having never witnessed Leeper enforce the dress code but then immediately contradicted that statement, noting Leeper had cared about enforcing certain aspects of the dress code, such as wanting the partners to wear closed shoes and not shoes made of fabric. (Tr. 498).

Several witnesses testified about shift supervisors consistently enforcing the dress code policy at the 75th Street store. Starbucks relies upon shift supervisors to enforce policies. (Tr. 626, 933-34; Joint Ex. 3 at 7:45). Edwards testified that as a shift supervisor, she had "***consistently coached baristas on standards*** around beverage production and recipes to ensure quality, as well as timeliness, showing up on time and ready to work their shifts, ***and dress code***; when people needed to put their hair up or take nail polish off that they had on over the weekend, that sort of thing." (Tr. 394) (emphasis added). Edwards also testified that she had enforced the dress code prior to January 31, including the last calendar quarter of 2021. (Tr. 395). Her testimony was corroborated by the audio recording of her PDC in which she can be heard telling Bellis about at least two separate coaching conversations she had personally conducted with baristas enforcing the dress code. (Joint Ex. 3 at 8:50).

By contrast, most—if not all—of the testimony regarding an alleged absence of enforcement of the dress code at the 75th Street store was either specifically refuted or so vague (without any names, dates, or other identifying information from which Starbucks could appropriately respond) that it cannot be credited. For example, McCown's testimony regarding an alleged lack of enforcement of the dress code consisted of the following generalized statement:

"[m]ultiple partners would wear jewelry that was not Starbucks approved, wore jeans, and things out of the color palette." (Tr. 75). Her only specific example involved Calvin Culey: she testified Culey was never reprimanded for violating dress code by wearing multiple rings, wearing jeans, and wearing a hoodie. (Tr. 76). But later McCown contradicted her own testimony, testifying she witnessed Leeper issue a verbal reprimand to Culey for wearing ripped jeans. (Tr. 252, 254). Culey also contradicted McCown's statements about him: he testified that Leeper had reprimanded him for his dress code violations on more than one occasion. (Tr. 893-94, 928). All the specific, credible evidence regarding previous enforcement of the dress code policy demonstrates that prior to January 31, the policy had always been consistently enforced at the 75th Street. As such, General Counsel has failed to prove any disparate enforcement occurred after the petition was filed, let alone that it occurred in response to alleged protected activities.

Assuming, *arguendo*, that there was disparate enforcement of the dress code policy comparing the periods before and after the petition's filing, any such change can be wholly explained by the change in leadership at the store. Bellis credibly testified that when he takes over management of a new store, he consistently enforces "the big three" standards: time and attendance, phone usage on the floor, and dress code. (Tr. 1428-29). Bellis further explained the steps he took to ensure partners understood his expectations with respect to their compliance with those standards at the outset, which were "very basic and easy to follow." (Tr. 1428-29). Consistent with his prior practice, Bellis conducted PDCs shortly after arriving at the 75th Street store, in part to explain his expectations of them as the interim leader in the store. (Joint Ex. 3). Bellis's actions had nothing to do with any of the employees' union activities. In fact, as Bellis explained during his PDC with Edwards, holding partners accountable to standards (including dress code) is something he must do as a store manager and had nothing to do with any of the employees' recent

union activities. (Joint Ex. 3 at 21:21) ("If I hold people accountable, it's something I would have done anyway, but again also I'm not trying to do that. I just want everyone to come to work on time and be in dress code and whatever."). As such, any disparate enforcement of the dress code policy, pre-petition vs. post-petition, reflected the difference between two different individual's management styles and was not because of any retaliatory motive. *See Rojas v. Fla.*, 285 F.3d 1339, 1343 (11th Cir. 2002) ("Different supervisors may impose different standards of behavior, and a new supervisor may decide to enforce policies that a previous supervisor did not consider important."); *Maiorini v. Farmers Ins. Exch.*, No. 14-1613, 2017 U.S. Dist. LEXIS 47471, at *125-26 (E.D. Pa. Mar. 30, 2017) (finding prior disciplinary measures "completely irrelevant" to establishing discriminatory animus where evidence showed changed management adopted a much stricter hands-on approach); *Jones v. Gerwens*, 874 F.2d 1534, 1541 (11th Cir. 1989) ("Courts have held that disciplinary measures undertaken by different supervisors may not be comparable for purposes of Title VII analysis"). Even Gregg acknowledged the difference between Leeper and other store managers' enforcement of the dress code, noting enforcement varied store-by-store and other managers were stricter in enforcing the dress code than Leeper had been. (Tr. 498-99).

Notably, General Counsel has not adduced any credible evidence of statements made by Bellis from which a retaliatory motive could be inferred. Apart from Edwards, whose testimony on the subject has been addressed at length above, the only witnesses who claimed to have any knowledge of Bellis as a store manager back in 2020 were Michael Vestigo and Madeline Fuchs. Neither witness provided credible testimony on the matter. Despite initially testifying Bellis did not strictly enforce policies during the one week in November 2020 when they overlapped, Vestigo later retracted those statements and clarified he had not personally made observations regarding Bellis's enforcement of policies at the 75th Street store in November 2020. (Tr. 467-69).

Likewise, Fuchs was not credible. She claimed Bellis was absent from the store from March 2020 to November 2020. Although she also claimed there was one month during which they overlapped and he did not enforce the dress code policy consistently, she failed to provide any specific details, such as names, dates, or other particulars. (Tr. 835-36).

Despite hours of audio recordings made without Bellis' knowledge, there is no record evidence of Bellis making any statements disparaging the Union. Instead, Bellis's statements about the Union, as reflected in those recordings, show he supported the partners and their feelings about the Union; he explicitly acknowledged Edwards's feelings in support of the Union as valid. (Joint Ex. 3 at 26:00 and 26:30). Without any evidence of union animus harbored by Bellis, General Counsel cannot show that the Company discriminatorily enforced the dress code policy in response to employees' union activities. Therefore, this allegation should be dismissed in its entirety.

b. Pins/Buttons

With respect to pins or buttons specifically, General Counsel has not and cannot prove any disparate enforcement of the pin policy comparing pre-petition and post-petition periods. As explained above, Starbucks' dress code policy, including it's one labor union pin policy, has remained virtually unchanged for more than ten years since it first withstood challenge in the Second Circuit Court of Appeals back in 2012. *See, e.g.*, *NLRB v. Starbucks Corp.*, 679 F.3d 70 (2d Cir. 2012). Hope Gregg testified Bellis described the pin policy during their PDC, telling her she could wear as many Starbucks pins as she wanted but only one non-Starbucks pin and a pronoun pin. (Tr. 504).

As explained above, the vast preponderance of the testimony General Counsel adduced claiming disparate enforcement of the dress code policy focused upon Leeper's primary reliance upon verbal reprimands when enforcing the dress code. Yet there is no evidence in the record of

anyone receiving any written discipline for alleged violations of the pin policy under subsequent managers. Instead, the only specific, credible evidence of alleged enforcement of the pin policy (as distinct from threatened enforcement) was Culey's testimony that Bellis had asked him to stop wearing "a little gnome pin" and a smaller, circular pin with a pun and a picture of toast on it during the shift meeting on February 14th. (Tr. 895-96). Bellis's focus in that instance had **nothing** to do with the Union or Union pins.

Hannah McCown provided testimony that was plainly not credible when she claimed to have observed Bellis reprimand Doran for a pin during the February 14 shift meeting: she then went on to explain that she had not seen the pin for which Doran was reprimanded because she was attending virtually, she had no personal knowledge, and she believed that the pin was neither a labor pin nor a Starbucks pin. (Tr. 68). McCown's other testimony regarding Bellis' pin policy enforcement was filled with generalities; when pressed for specific examples of Bellis's stricter enforcement of the pin policy against Union supporters, she could not articulate any. (Tr. 68-71). General Counsel's failure to elicit testimony from Doran herself about Bellis's reprimand of Doran on February 14 also speaks volumes as to why McCown's testimony cannot be credited.

Multiple witnesses, including Culey, confirmed a verbal reprimand regarding dress code following the petition was entirely consistent with Leeper's previous enforcement of the dress code policy. (Tr. 894). Simply put, there is no credible evidence of any disparate enforcement of the Starbucks pin policy.

Finally, and perhaps even most critically, several of General Counsel's witnesses refuted the allegation that Bellis more strictly enforced the pin policy. Claypool and Fuchs both testified Bellis did not strictly enforce the pin policy. (Tr. 626, 835-36). Indeed, Claypool credibly testified Bellis told partners they could still wear an additional non-Starbucks pronoun pin, in addition to

their Workers' United pin, and that Bellis even went so far as to purchase those additional pronouns pins for the partners and distributed them. (Tr. 626). It follows that the record evidence demonstrates General Counsel failed to prove Starbucks more strictly enforced the pin policy at the 75th Street store to discourage unionization or in response to protected activity and that these allegations must be dismissed.

c. Courier Log

General Counsel also has not proved Starbucks more strictly enforced its courier log policy in response to partners' union activities at the 75th Street store. A photo of the courier log is included on page 8 of Respondent's Exhibit 18 and shows partners completed the log consistently for dates prior to January 31. (Resp. Ex. 18 at 8). The photographed page spans the last weeks of December 2021 and the first weeks of January 2022 and shows entries on 12/20, 12/21, 12/21, 12/22, 12/23, 12/24, 12/25, 12/26, 12/27, 12/28, 12/29, 12/30, 1/4, 1/5, 1/7, 1/11, 1/11. (Resp. Ex. 18 at 8).

Moreover, multiple witnesses testified credibly concerning the 75th Street store's consistent enforcement of the courier log policy prior to January 31. Claypool credibly testified she consistently completed the courier log at least once a day, sometimes more, throughout her employment at Starbucks. (Tr. 581). Claypool also testified briefly about the other electronic methods of tracking deposits, but none of those methods serve the same purpose as a courier log. (Tr. 582-83). Questions regarding whether it would be possible to determine whether a deposit had taken place without recording it in the courier log miss the point. (Tr. 583). The courier log exists to hold the courier accountable for money transferred into its possession. While there is no dispute that other methods of tracking deposits exist, no one could have discovered the missing November 4 deposit without the courier log. (Tr. 584; Resp. Ex. 18).

Claypool further testified Doran and Culey were the only ones out of the five shift supervisors at the 75th Street store who had issues completing the courier log. (Tr. 627-28). When such a miss would occur, Claypool testified either she or one of the other more tenured shift supervisors would coach the shift supervisor who made the mistake, reminding them to complete the log. (Tr. 581-82). Critically, Claypool further testified the coachings she remembered with Culey and Doran reminding them to complete the courier log had occurred not long after they had been promoted to shift supervisor, long before January 31. (Tr. 582).

Edwards provided similar credible testimony regarding the store's historical enforcement of the courier log policy. Edwards recalled that "[s]ometimes the deposit would be recorded electronically, but the person preparing it would forget to fill in the book." (Tr. 275). Like Claypool, she recalled only Doran and Culey having forgotten to complete the courier log. (Tr. 417). Edwards testified concerning multiple safeguards built into the store's procedures to catch such missed entries. (Tr. 348). Edwards explained that missed courier log entries were "found one of two ways": either (i) the following day by the morning shift supervisor, whose responsibilities include checking inside the time locked portion of the safe where deposits are held and confirming those match the entries in the courier log, or (ii) if the morning shift supervisor missed it too, the missed entry would be caught when the courier came to pick up the bags at hand off. (Tr. 275, 348). When asked whether she was aware of anyone being disciplined for failing to complete the log, Edwards testified Leeper had promulgated "reminders" to the shift supervisors "[i]n weekly or sometimes biweekly shift meetings." (Tr. 275). Edwards also recalled Amanda Pittman, though only the interim store manager for a week, as someone who may have also reminded the shift supervisors to complete the courier log. (Tr. 417).

Culey testified he completed the courier log "fairly consistently" after learning he was

supposed to be completing the log. (Tr. 916). Culey admitted that when he was first hired as a shift supervisor in July 2021 (while Leeper was manager) he "wasn't trained on closing very well, and I didn't know that you had to write in the courier log for the first like two or three months." (Tr. 915-16). According to Culey, one of his coworkers mentioned the courier log as something he should be doing, and he acknowledged he had not been doing it. (Tr. 916). From then on, Culey testified he then completed the courier log. (Tr. 916).

Even Doran, the same partner who received the corrective action for, among other things, failing to complete the courier log, admitted her prior store manager had reprimanded her before for not consistently completing the courier log. (Tr. 708). Doran also acknowledged that she did not contest the part of her Final Written Warning that related to her failures with respect to the courier log. (Tr. 782). In short, the evidence regarding the courier log policy at the 75th Street store is consistent and confirms that management always enforced the requirement that shift supervisors complete the courier log before and after the filing of the petition.

Indeed, the only record evidence contradicting these accounts came from Madeline Fuchs, a former partner who had not worked in the 75th Street store during any of the relevant time periods. Apart from her statements concerning her own missed courier log entries, Fuchs provided no credible, specific testimony about the 75th Street store's courier log policy enforcement. It follows that Fuchs' testimony should not be credited.

The uncontradicted record evidence shows that Doran received a written corrective action for, among other things, failing to complete the courier log on February 16. (GC Ex. 21). Additionally, uncontradicted testimony from Claypool and Culey establishes that Jen Seymour, the new store manager, reminded the shift supervisors to complete the courier log and the importance of doing so during one of their shift meetings after Doran had received her Final

Written Warning. (Tr. 583-84, 917).

These are the only two events to which General Counsel points in attempting to establish that Starbucks' enforcement of the courier log policy as to the shift supervisors was unlawful. Seymour reminding shift supervisors to complete the courier log does not constitute unlawful stricter enforcement of the policy: as explained above, Edwards and others testified that such reminders have long been provided, predating union activities at the store. Likewise, Doran's Final Written Warning cannot be viewed as unlawful stricter enforcement since Doran admitted that in multiple instances others reminded her to complete the log, her failure to do so was accompanied by several cash variances and overall cash handling negligence, and Doran herself did not contest the Company's basis for holding her accountable for not completing the courier log.

Wright Line is a causation test, requiring proof by a preponderance of the evidence that an employee's union or other protected, concerted activity was a motivating factor in the employer's stricter enforcement of its rules. As explained above, the General Counsel has not—and cannot—show any violation of the Act occurred here with respect to enforcement of the courier log policy. It follows that the allegations in Paragraph 24 must be dismissed.

5. General Counsel Failed to Show Bellis Instructed Others to More Strictly Enforce the Dress Code Policy in Response to Union Activities.

In Paragraph 7 of the Complaint, General Counsel alleged Starbucks, through Drake Bellis, "instructed employees to start more strictly enforcing the Respondent's dress code in response to employees' union activities and/or support" in "early February 2022" at the 75th Street store. (Third Consol. Compl. ¶ 7).

As explained *supra*, there is no credible evidence that Bellis himself more strictly enforced the dress code policy at the 75th Street store in response to partners' union activities. Relatedly,

there is no credible evidence that Bellis directed others to enforce the dress code more strictly in response to union activities. As Bellis credibly testified, whenever he enters a new store, he takes steps to ensure all partners understand his basic expectations. (Tr. 1428-29). Those expectations included holding partners, including shift supervisors, to standards on dress code and enforcing dress code. (Tr. 1428-29).

Nothing about Bellis's communications surrounding consistent enforcement of the dress code has anything to do with the partners' union activities. Indeed, multiple witnesses testified in the absence of a store manager or assistant store manager, Starbucks relies upon shift supervisors to enforce policies as the next highest ranking job classification. (Tr. 626, 933-34; Joint Ex. 3 at 7:45). For example, Edwards testified as a shift supervisor, she herself had "***consistently coached baristas on standards*** around beverage production and recipes to ensure quality, as well as timeliness, showing up on time and ready to work their shifts, ***and dress code***; when people needed to put their hair up or take nail polish off that they had on over the weekend, that sort of thing." (Tr. 394). Edwards also testified to having enforced the dress code prior to January 31, 2022, including the last calendar quarter of 2021. (Tr. 395). Her testimony was corroborated by her PDC recording in which she told Bellis about at least two separate coaching conversations she personally had with baristas enforcing the dress code. (Joint Ex. 3 at 8:50). Culey and Claypool also testified regarding the shift supervisors' role in enforcing discipline, including the dress code policy. (Tr. 626, 933-34).

As explained above, different supervisors may impose different standards of behavior without violating the Act provided those differences are not motivated by employees' protected activities. *See Rojas v. Fla.*, 285 F.3d 1339, 1343 (11th Cir. 2002) ("Different supervisors may impose different standards of behavior, and a new supervisor may decide to enforce policies that

a previous supervisor did not consider important."); *Maiorini v. Farmers Ins. Exch.*, No. 14-1613, 2017 U.S. Dist. LEXIS 47471, at *125-26 (E.D. Pa. Mar. 30, 2017) (finding prior disciplinary measures "completely irrelevant" to establishing discriminatory animus where evidence showed change in management adopted a much stricter hands-on approach); *Jones v. Gerwens*, 874 F.2d 1534, 1541 (11th Cir. 1989) ("Courts have held that disciplinary measures undertaken by different supervisors may not be comparable for purposes of Title VII analysis").

Again, as set forth above, General Counsel has not adduced any credible evidence of statements made by Bellis from which a retaliatory motive can be inferred. Despite hours of audio recordings made without Bellis's knowledge, there is still no record evidence of Bellis making any statements disparaging the Union. Instead, Bellis's statements about the Union, as reflected in those recordings, show the partners viewed him as their advocate and that he supported the partners and their feelings on the Union, even going as far as acknowledging Edwards's feelings in support of the Union as valid. (Joint Ex. 3 at 26:00 and 26:30). Without any evidence that Bellis harbored any union animus, or evidence that Bellis directed enforcement of the dress code against partners because they were or happened to be Union supporters, General Counsel cannot prove that he instructed others to discriminatorily enforce the dress code policy in response to the partners' union activities. Therefore, this allegation should be dismissed in its entirety.

6. General Counsel Failed to Show Starbucks Threatened Reprisals Against Those Who Refused to Listen to Lawful Employer Speech at Voluntary Company Meetings.

Several paragraphs in the Complaint aim to limit the employer's rights under section 8(c) of the Act. First, in Paragraph 9 of the Complaint, General Counsel alleged Starbucks, through Drake Bellis, "coerced employees by introducing anti-union discussions during Partner Development Conversations, mandatory meetings that are normally reserved for evaluations and

career planning." (Third Consolidated Compl. ¶ 9(a)-(d)). Second, in Paragraph 23 of the Complaint, General Counsel alleged Starbucks "threatened its employees with unspecified reprisal if they declined to listen to employer speech concerning employee exercise of Section 7 rights" on six separate occasions. The specified dates and locations include three PDCs, one conversation involving Jenkins on February 2 at the 75th Street store, one voluntary employer presentation on March 3, and one conversation on an unknown date in early February involving Drake Bellis at the 75th Street store. None of these allegations have any support in fact or law.

The March 3 meeting was voluntary. Several partners, including Michael Vestigo, chose not to attend and neither were threatened with nor suffered adverse consequences. (Tr. 449-51). Multiple witnesses also testified recalling Bellis, Seymour, or both referring to the meeting as voluntary. For example, Culey credibly testified his Affidavit accurately recorded his recollection that Josh Hall, Carlee Stoermann, Kelsey Stoermann, Bailey Charbonneau, Delia Twaddell, and Michael Vestigo did not attend the March 3 meeting. (Tr. 951-52).

General Counsel did not produce any evidence of any discipline or threatened discipline made against any partner who chose not to attend the March 3 meeting, nor any other meeting at which an alleged employer speech occurred.

Similarly, Bellis credibly testified the PDC meetings were voluntary, identifying several individuals (including Josh Hall, Carlee Stoermann, Kelsey Stoermann, Bailey Charbonneau, Delia Twaddell, and perhaps others) who did not attend any PDC meetings, and noting no discipline or adverse actions were ever taken against those partners for not doing so. (Tr. 1428).

Lastly, record evidence established the store's shift meetings were also not mandatory. At the outset of her PDC, Edwards noted she suffered no reprimand or other discipline for failing to attend the February 14 shift meeting with Bellis. (Joint Ex. 3 at 7:45). In short, there is no credible

record evidence any alleged captive audience meetings were in fact mandatory, nor is there any evidence of any threat of reprisals made against those who chose not to attend or participate in such alleged mandatory meetings.

A voluntary meeting is—by definition—not a "captive audience" meeting. Even more, "captive audience" meetings remain lawful under controlling law. Starbucks has a statutory right to educate its partners about unions, collective bargaining, and the Act. Section 8(c) of the Act states clearly: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit." As such, Starbucks is entitled to educate its partners about what it anticipates happening should a union be elected so long as those statements are based on objective fact. An "employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *See Gissel*, 395 U.S. at 617.

Indeed, Section 8(a)(1) leaves "an employer . . . free to communicate to [its] employees any of [its] general views about unionism or any of [its] specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id.* at 618. "This First Amendment right is embodied in Section(s) 8(c) [of the Act], which allows the employer to express 'any views, argument, or opinion' in any media form without committing an unfair labor practice provided that 'such expression contains no threat of reprisal or force or promise of benefit.'" *NLRB v. Pratt Whitney Air Craft Div., United Technologies Corp.*, 789 F.2d 121, 134 (2d Cir. 1986) (footnotes omitted). "Granting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids

the workers by allowing them to make informed decisions. . . .” *Id.* The District of Columbia Circuit Court of Appeals recently affirmed that “absent threats or promises Section 8(c) unambiguously protects any views, argument or opinion—even those that the [NLRB] finds misguided, flimsy, or daft.” *Trinity Servs. Grp. v. NLRB*, 998 F.3d 978, 980 (D.C. Cir. June 1, 2021) (internal quotations omitted).

In addition, nearly 75 years of precedent supports an employer’s right to conduct so-called “captive audience” meetings. *See, e.g.*, *Electrolux Home Prod., Inc.*, 368 NLRB 34 (2019) (“It is lawful for an employer to conduct a captive-audience meeting to persuade employees not to unionize while refusing to allow others to express their opposing, pro-union viewpoints during the meeting”); *Daisy Originals Inc.*, 187 NLRB 251, 255 (1971) (“Respondent was at liberty to determine the use to which it wished to put the time for which it was paying the employees”); *Addressograph-Multigraph Corp*., 228 NLRB 6, 8-9 (1977); *The Babcock & Wilcox Co.*, 77 NLRB 577, 578 (1948) (“Even assuming . . . that the respondent required its employees to attend and listen to the speeches, we conclude that it did not thereby violate the Act”); *Fontaine Converting Works, Inc.*, 77 NLRB 1386, 1387 (1948) (holding employer did not violate the Act by “compelling its employees to attend and listen to speeches on company time and property”). As a result, even if the meetings here were “captive audience” meetings, which they were not, Starbucks would have been well within its rights to hold them to share facts, opinions, and experiences. GC Memorandum 22-04 (April 7, 2022) recognizes that this principle remains the law that controls disposition of these and any related allegations. Accordingly, even had the meetings covered by Paragraphs 9 and 23 of the Complaint been mandatory, they would not have violated the law and the allegations must be dismissed in their entirety.

Starbucks notes, in passing, that General Counsel's torrid mission of converting lawful employer speech under 8(c) of the Act into unfair labor practices is so over the top that she has alleged that even a one-on-one conversation between Jenkins and Edwards on February 2 in which the Union was allegedly mentioned once somehow constitutes an unlawful "captive audience" speech. This overkill permeates the entirety of General Counsel's case and should inform disposition of not only the allegations discussed in this point heading but the entirety of General Counsel's case.

7. General Counsel Failed to Show Starbucks Made Any Unlawful Threats or Coercive Statements During the Campaign at the 75th Street Store.

Starbucks did not violate the law when sharing information about unionization with partners. As explained above, "absent threats or promises Section 8(c) unambiguously protects any views, argument, or opinion—even those that the [NLRB] finds misguided, flimsy, or daft." *Trinity Servs. Grp.*, 998 F.3d at 980. Employer statements to employees may convey general and specific views about unions or unionism or other protected activity if the communication does not contain a "threat of reprisal or force or promise of benefit." *Gissel*, 395 U.S. at 618.

In specifically assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp.*, 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*). As explained below, Starbucks did not make any unlawful statements during the organizing campaign at the 75th Street store.

a. Loss of Promotion Opportunities

General Counsel made several allegations claiming Starbucks threatened employees with loss of promotion opportunities. First, in Paragraph 13(c) of the Complaint, General Counsel alleged that on February 15, Starbucks, through Drake Bellis, "[t]hreatened employees with a loss of promotional opportunities if employees selected the Union as their bargaining representative" at the 87th Street store. (Third Consolidated Compl. ¶ 13(c)). Additionally, in Paragraph 14(a) of the Complaint, General Counsel alleged Starbucks, through Drake Bellis, "[t]hreatened employees with loss of promotion opportunities because of their Union activities and/or support" on February 16, 2022 at the Shawnee Mission and Quivira store. (Third Consolidated Compl. ¶ 14(a)). Neither allegation has any merit, as demonstrated by the credible record evidence adduced at the hearing.

In support of these allegations, General Counsel relies primarily upon Doran's testimony about her PDC with Bellis. (Tr. 669). According to Doran, she brought up the subject of promotion to the assistant store manager ("ASM") position because "[she] knew that promoting to ASM would put [her] at odds with the Union because the Union was specifically for partners and -- or sorry, partners -- baristas and Shift Supervisors -- and if [she] were to promote to ASM, then it would . . . put [her] at odds with the Union" meaning "[she] wouldn't be able to participate in [the Union]." (Tr. 668). Doran testified Bellis confirmed promotion into a supervisory role would put her at odds with the Union. (Tr. 669). Doran said Bellis then "mentioned that promoting [her] to an ASM would be difficult to do, you know, under Union because, according to him, Unions promote based on like tenure, and so he wouldn't have much of a say or much of a decision as to whether [she] would be promoted or not." (Tr. 669). Additionally, Doran testified Bellis made statements indicating that it would be easier for him to promote another partner, Emma, from barista to a shift supervisor than it would be to promote Doran to ASM. (Tr. 669).

Nothing in Doran's testimony, assuming its truth, indicates Bellis threatened loss of promotional opportunities for Doran if she supported the Union or the Union became the partners' collective bargaining representative. First, Bellis agreed with Doran that promotion to ASM would mean she was part of management and outside the bargaining unit, which has been Starbucks' consistent position in negotiating election agreements. Second, Bellis merely noted his understanding that unionization of the store could make promotion of Doran more challenging because of the possibility that under a collective bargaining agreement seniority would be a factor in deciding who was to be promoted. Neither of these statements was threatening and both represented a reasonable explanation by Bellis to Doran as to what might affect her securing a promotion to ASM in the future if the store unionized. Third, and most critical, is Bellis's testimony that during the PDCs (including that of Doran) he remarked upon how excited he was to work with store partners on their skill development and advancement. The PDC recording admitted as Joint Exhibit 3 corroborates Bellis's testimony in this regard. (Joint Ex. 3 at 14:21). Accordingly, the record refutes the allegation that Bellis threatened partners' promotional opportunities to deter support for the Union. The evidence is completely to the contrary.

Doran's testimony was nothing more than a manipulation of Bellis's innocuous and lawful statements acknowledging Starbucks may have to adhere to specific provisions in a collective-bargaining agreement if the store unionizes, such as a provision regarding seniority governing promotions. Statements such as these are not unlawful. *See, e.g.*, *Dish Network Corp.*, 358 NLRB No. 29 (2012) (employer may inform its employees unionization will bring change in the manner in which employer and employees deal with each other); *Int'l Baking Co.*, 348 NLRB 1133, 1135 (2006) (employer's explanation it would be unable to be flexible with lateness policy, if a disciplinary provision was included in collective-bargaining agreement, was not unlawful); *FGI*

Fibers, 280 NLRB 473, 473 (1986) (employer's statement that it would discontinue its open-door policy if a union was elected because it would be required to go through grievance and other union procedures not unlawful); *Tri-Cast, Inc.*, 274 NLRB 377 (1985) (employer's remark that his "informal and person-to-person" interaction would change and operations would be run "by the book, with a stranger" was not unlawful); *United Artists Theatre*, 277 NLRB 115, 115 (1985) (employer's statement that employees would vote away their right to deal with management directly if they voted for the union not unlawful). Therefore, these allegations should be dismissed.

b. Loss of Previously Announced Wage Increases

General Counsel lodged multiple allegations of Starbucks threatening employees with loss of future wage increases. First, in Paragraphs 10(a)-(d) of the Complaint, General Counsel alleged Starbucks, through Drake Bellis, "[t]hreatened employees with loss of previously announced wage increases if employees selected the Union as their bargaining representative" during shift meetings in early February at the 75th Street store and during PDCs held with partners on February 14 and 15 at various locations. (Third Consolidated Compl. ¶ 10(a)-(d)). Next, in Paragraph 13(b), General Counsel alleged on February 15 Starbucks, through Bellis, "[t]hreatened employees with a loss of previously scheduled wage increases if employees selected the Union as their bargaining representative" at the 87th Street store. (Third Consolidated Compl. ¶ 13(b)). Again, in Paragraph 18(a), General Counsel alleged on February 23, Starbucks, through Bellis, "[t]hreatened employees with the loss of previously scheduled wage increases if employees selected the Union as their bargaining representative" via telephone. (Third Consolidated Compl. ¶ 18(a)). Finally, in Paragraph 12(a), General Counsel alleged on February 15, Starbucks, this time through Sara Jenkins, "[t]hreatened employees with the loss of previously announced wage increases if employees selected the Union as their bargaining representative" at the 75th Street store. (Third

Consolidated Compl. ¶ 12(a)). However, none of these allegations have any merit as demonstrated by the credible record evidence.

Although multiple witnesses provided various accounts regarding Bellis's and Jenkins's statements concerning wage increases at the 75th Street store, the most reliable evidence of those conversations—perhaps the only reliable evidence—exists in the recording Hope Gregg surreptitiously made during her telephone call with Bellis on February 23, 2022, a transcript of which is in evidence as General Counsel Exhibit 50. The recording and accompanying transcript show Bellis made it abundantly clear he did not know whether the store would be eligible for June pay raises because he did not know whether those raises were consistent with Starbucks' obligation to maintain the status quo and "nothing gets taken away." Bellis's reference to this "specific" question being "tricky" was understandable because whether an increase in pay or benefits is a change to the status quo for purposes of the Act is a complicated legal question. *See, e.g.*, *Wilkes-Barre Hosp. Co., LLC d/b/a Wilkes-Barre Gen. Hosp. & Penn. Ass'n of Staff Nurses & Allied Pros., AFL-CIO*, 362 NLRB 1212, 1217 (2015) (holding status quo included certain three percent wage increases where employer "established a practice" of such raises and therefore employees "thus had an expectation of receiving a raise"); *but see Pg Publ'g Co., Inc.*, 368 NLRB No. 41 (Aug. 22, 2019) (past annual benefit increases did not require employer to continue benefit increases to maintain status quo); *House of the Good Samaritan*, 268 NLRB 236, 237 (1983) (where there was "insufficient evidence" employer had "consistent and inflexible" practice of covering increases in health insurance premium, employer's decision not to do so did not violate its obligation to maintain the status quo post-certification).

The question of whether an employer should implement a wage increase planned or announced prior to an organizing campaign is a difficult and fact-intensive one, as the Board has explained:

> A resolution of whether, in holding up a wage increase until after the election, an employer violated the Act, is most difficult under existing Board cases. On the one hand, the Board rules that an employer's legal duty is to proceed as he would have done had the union not been on the scene. Thus, in *Gates Rubber Company*, 182 NLRB 95, the Board found the company, which had withheld increases that normally would have been granted but for the presence of the union and the pendency of the election, to have violated the Act. In a later case, *The Singer Company, Friden Division*, 199 NLRB 1195, the Board reversed the Trial Examiner who had followed this rationale and had found that promotions had been unlawfully withheld on the ground that the company would have granted them but for the advent of the union.
>
> On the other hand, it is extremely difficult for an employer to so proceed, i.e., as if the union were not in the picture, for, under a long line of cases, to do so and to grant benefits during the pendency of an election an employer risks being charged with interference with the election, as well as with unfair labor practice conduct.

Heckethorn Mfg. Co., 208 NLRB 302, 306 (1974). Here, as Bellis openly stated, he understood the Company's obligation was to maintain the status quo in the event the Union won the election while negotiations were underway for a collective bargaining agreement, but he was befuddled, understandably, over whether the status quo consisted of (a) the terms and conditions of employment that existed at that moment in time or (b) the terms and conditions that the Company had indicated would exist in summer 2022, long after the election was held. Bellis stated: "I don't know the answer" to whether unionized stores would receive June 2022 raises. His explanation that the answer to the question depends on how "status quo" is "interpreted" was accurate and he communicated to any partner to whom he spoke that he simply did not know whether the store would be able to implement the summer 2022 wage increase. His further clarification that "nothing

gets taken away" because there is a "protection . . . in the law" that "you don't lose anything" also demonstrates that, far from "threatening" to "withhold" wage increases, Bellis repeatedly assured Hope Gregg and other partners that Starbucks would maintain the status quo. In view of the complexity of the question with which Bellis grappled, his confession that he did not know the answer, and his effort to assure partners that they would not lose pay or benefits that they already had, these allegations should be dismissed.

c. Limits on Supervisor Performance of Bargaining Unit Work

In Paragraph 18(b) of the Complaint, General Counsel alleged on February 23, Starbucks, through Drake Bellis, "[t]hreatened employees with the loss of an existing benefit by telling employees that managers could not assist employees on the floor if employees selected the Union as their bargaining representative" via telephone. (Third Consolidated Compl. ¶ 18(b)). There is no credible evidence supporting this allegation.

Bellis told Gregg that "typically" a collective bargaining agreement would "probably" not allow a store manager or district manager to "do work as a barista or a shift supervisor." (GC Ex. 50 at 14). This is true. Collective bargaining agreements typically *do* limit (if not prohibit) manager performance of bargaining-unit work. "Unions…bargain for provisions that require supervisors to refrain from performing unit work, and in this way attempt to draw tight jurisdictional lines around their certified bargaining unit work." Katherine V.W. Stone, *Employee Representation in the Boundaryless Workplace*, 77 Chi.-Kent L. Rev. 773, 795 (2002); Donald Peterson, *Arbitral Perspectives in Supervisor Work Restriction Cases,* Disp. Resol. J., NOV 2000/JAN 2001, at 62, 64 (explaining that bargaining unit work clauses "normally restrict supervisors to do such work for training or instruction purposes; when there is experimental work; or in 'emergencies'" and where there is "no supervisory work restriction language in the parties' agreement," a "recognition

clause" which identifies "job classifications" and excludes supervisors may be relied upon to oppose manager performance of bargaining unit work). "The Board has held that an employer's failure to bargain over transfer of bargaining unit work to supervisory positions is an unfair labor practice. *Wendt Corp. & Shopmens Loc. Union No.* 576, 369 NLRB No. 135 (July 29, 2020). The Board has also treated a supervisor's performance of "shoulder-to-shoulder" work with the "rank-and-file" employees as evidence demonstrating the purported supervisor was in fact properly a member of the bargaining unit. *Lovilia Coal Co.*, 275 NLRB 1358, 1368 (1985). "Shoulder-to-shoulder" work is precisely what Starbucks managers do when they perform the same work as baristas and shift supervisors during a shift. Bellis was entirely reasonable in telling partners that he expects the Union to negotiate for the protection of bargaining unit work by limiting or prohibiting managers' performance of bargaining unit work if the Union was elected.

Bellis was careful to explain that terms of collective bargaining agreements vary, the collective bargaining agreement reached by one bargaining unit does not govern other bargaining units, and "each store is in their own" bargaining unit. This context, in combination with Bellis's use of the caveats "typically" and "probably," demonstrates Bellis was making an objective prediction based upon the factual statement that collective bargaining agreements typically limit manager performance of bargaining unit work. He did not indicate that this outcome was certain or within Starbucks' unilateral control or discretion. Accordingly, these statements were not a threat within the meaning of the Act and this allegation must be dismissed. *Gissel*, 395 U.S. at 618 (a lawful prediction must be based upon "objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control").

d. Loss of Ability to Transfer or Pick Up Shifts at Another Store

General Counsel made several allegations claiming Starbucks had threatened employees

with loss of ability to transfer stores. First, in Paragraph 13(a) of the Complaint, General Counsel alleged that on February 15, Starbucks, through Drake Bellis, "[t]hreatened employees with an inability to transfer or change shifts if employees selected the Union as their bargaining representative" at the 87th Street store. (Third Consolidated Compl. ¶ 13(a)). Additionally, in Paragraph 15(a) of the Complaint, General Counsel alleged that in mid-to-late February, Starbucks, through Drake Bellis, "[t]hreatened employees with a loss of ability to transfer if employees selected the Union as their bargaining representative" via telephone. (Third Consolidated Compl. ¶ 15(a)).

For both allegations, General Counsel relies solely on testimony from Doran regarding statements Bellis allegedly made both during her PDC and by telephone several days later. First, Doran testified having initially asked Bellis during her PDC about whether she could transfer out of the 75th Street store to avoid "potentially losing my raise or losing my healthcare," or "being able to promote." (Tr. 674-75). Doran testified Bellis responded "he would have to ask like his higher-ups and see, you know, if it was possible." (Tr. 675). Doran then testified she phoned Bellis a few days after her PDC and asked again. (Tr. 678). Doran recalled that Bellis "gave [her] the same answer." (Tr. 678). According to Doran, Bellis called her the next morning to follow up and informed her he had not been able to approve her transfer request because the store was currently understaffed. (Tr. 679-81). Rather than accept this answer, Doran testified she threatened to quit and reapply at the store to which she wanted to transfer to bypass the 75th Street store's understaffing issue. (Tr. 681). According to Doran, Bellis replied "do whatever you need to do for your family." (Tr. 681).

Doran also testified she asked Bellis about "picking up shifts at different stores." (Tr. 675). Bellis claimed that "during collective bargaining, it would be difficult for [her] to pick up shifts or

transfer to another store." (Tr. 675). When pressed by General Counsel for additional details concerning what Bellis said about picking up shifts, Doran initially stated, "I'm trying to remember. The PDC was so long ago. It's hard for me to recollect all the information." (Tr. 675). Then, when pressed again, Doran added, "I think he mentioned that like, once the voting began, is when it would be, you know, hard for me to transfer or would -- I would be like unable to transfer. I believe he said that." (Tr. 676).

Doran's testimony on this subject is not credible, particularly with respect to her statement claiming Bellis told her she would be unable to transfer "once the voting began." (Tr. 676). Indeed, Doran's last statement was elicited through leading questions and badgering despite the witness' statements she was unable to remember anything else Bellis said on the subject. Additionally, the entirety of Doran's testimony on the ability of partners to transfer after a vote is wholly contradicted by statements Bellis made in response to similar questions posed by other partners, including Gregg, during the February 23 phone call she recorded. (GC Ex. 50 at 11-12). When Gregg asked Bellis what would happen to her ability to transfer stores if the store unionized (GC Ex. 50 at 11-12), Bellis replied truthfully, "I don't know the answer to that. . . . And I don't know if anybody has the answer to that." (GC Ex. 50 at 12). Bellis further explained, "[w]ell, in our store right now people can't transfer because there's not enough people in the store to run it. . . . that factor has nothing to do with the union. That has to do with running the business." (GC Ex. 50 at 12-13).

Bellis's recorded statements refute these allegations insofar as they indicate what he actually said when the same questions that Doran testified that she posed to him were put to him by Gregg. If, *arguendo*, Doran's testimony is nonetheless credited, Bellis's responses to her made clear that he was not threatening her but instead, predicting the possible consequences of

unionization based on objective facts. *See, e.g., Wild Oats Mkts., Inc.*, 344 NLRB 717 (2005) (statement "in collective bargaining you could lose what you have now" was not unlawful because it explained negative outcomes in the collective bargaining process). Accordingly, these allegations should be dismissed.

e. Encouraging Employees to Quit

General Counsel lodged two separate allegations claiming Starbucks coercively encouraged partners to quit. First, in Paragraph 12(b) of the Complaint, General Counsel alleged that on February 15 Starbucks, through Sara Jenkins, "[i]n response to employees' union activities and/or support, coerced employees by inviting employees to resign if they supported the Union" at the 75th Street store. (Third Consolidated Compl. ¶ 12(b)). Although the uncontradicted evidence shows Jenkins may have said something to that effect, the totality of the credible evidence shows her statement did not violate the Act. Not only did Jenkins not threaten or otherwise coerce any partner but, further, Jenkins's statement had nothing to do with any partner unionizing.

Jenkins credibly testified she once asked Hannah McCown why she worked at Starbucks if McCown hated it so much. (Tr. 1264). Jenkins explained the statement came up during "a conversation where [McCown] was sharing very emotionally how she felt about some of the things at Starbucks and, you know, creating a lot of reasons why she struggles to come to work and do her job successfully." (Tr. 1264). Jenkins further explained her reaction to McCown's emotional complaints: from Jenkins's perspective, it was "not typical for partners that work at Starbucks to have so many reasons they don't want to come to work. Starbucks provides typically a great environment for partners, and we uphold partner care very high. So, to hear a partner so disgruntled, it's just not normal." (Tr. 1264).

In analyzing whether Jenkins's statement violates 8(a)(1), it must be viewed objectively.

See, e.g., Mesker Door, Inc., 357 NLRB 591, 595 (2011). Jenkins did not threaten McCown's job, wages, or working conditions, nor would a reasonable employee have viewed Jenkins's statement as a threat. To the contrary, Jenkins's statement was to the effect that McCown had control over her own life and should consider whether continuing to work at Starbucks was desirable for her in view of how unhappy she was being employed there. In context, Jenkins's remark was not coercive or threatening, it was an expression of advice to a partner who had revealed her innermost struggle with remaining employed at a job that she was having difficulty tolerating emotionally. Nor did Jenkins's remark have anything to do with McCown wanting to unionize or the store selecting the Union as collective bargaining representative. It follows that this allegation should be dismissed in its entirety.

Second, in Paragraph 15(b) of the Complaint, General Counsel alleged that in mid-to-late February, Starbucks, through Drake Bellis, "[c]oerced employees by encouraging employees to quit and apply at other non-union Respondent stores in order to receive a previously scheduled wage increase and to keep their existing health benefits" via telephone. (Third Consolidated Compl. ¶ 15(b)). There is no record evidence supporting this allegation against Bellis. Instead, the only record evidence involves claims involving an unidentified actor from the Starbucks Partner Resources Center. (Tr. 680-81). Notably, General Counsel failed to adduce any evidence that the unidentified speaker was either a 2(11) supervisor or 2(13) agent under the Act. Indeed, the scant evidence elicited appeared wholly incredible. Therefore, this allegation should be dismissed in its entirety.

f. Loss of Health Benefits

In Paragraph 13(d) of the Complaint, General Counsel alleged that on February 15, Starbucks, through Drake Bellis, "[t]hreatened employees with the loss of health benefits if

employees selected the Union as their bargaining representative" at the 87th Street store. (Third Consolidated Compl. ¶ 13(d)). However, there is no credible evidence supporting this allegation.

General Counsel relies solely upon testimony from Doran regarding statements Bellis allegedly made during her PDC about health care benefits. But all that Doran testified Bellis said was that "during collective bargaining, you know, people could bargain for like higher wages or different things, you know, at the expense of certain healthcare and that that could affect my facial feminization surgery coverage. It's something that not a whole lot of companies cover currently, so that definitely like raised my anxiety about, you know, participating in the Union and what could be the repercussions of that." (Tr. 674).

Nothing about these statements violates the Act. Section 8(c) of the Act permits an employer to inform employees that benefits are negotiable during collective bargaining. *See, e.g.*, *Ludwig Motor Corp.*, 222 NLRB 635 (1976). Absent threats or promise of benefit, merely informing partners about the realities of the collective bargaining process, including its advantages and disadvantages, does not violate the Act. *See Langdale Forest Prods. Co.*, 335 NLRB 602 (2001); *see also Wild Oats Mkts., Inc.*, 344 NLRB 717 (2005) (statement that "in collective bargaining you could lose what you have now" was not unlawful because it explained negative outcomes in the collective bargaining process). It follows that this allegation should be dismissed in its entirety.

g. Stabbed in the Back Statement

In Paragraph 6(a) of the Complaint, General Counsel alleged that on February 2, Starbucks, through Sara Jenkins, "[c]oerced employees by telling them they stabbed her in the back by naming her in a letter publicly announcing employees' union support" at the 75th Street store. (Third Consolidated Compl. ¶ 6(a)). There is no credible evidence supporting this allegation.

The only evidence General Counsel presented in support of this allegation was Hannah Edwards's testimony that during a conversation at the 75th Street store on February 2, Jenkins referred to the Union as "the elephant in the room," told Edwards "[t]his doesn't have to be uncomfortable," and then said that Edwards had "stabbed her in the back" in connection with what Edwards understood was a reference to the "Dear Kevin" letter. (Tr. 290; GC Ex. 5).

Jenkins denied telling Edwards she felt stabbed in the back by the letter. (Tr. 1262). Jenkins denied telling anyone she felt "stabbed in the back" by the Union's letter. (Tr. 1262). Jenkins credibly testified that she was, understandably, "a little upset" when she read the "Dear Kevin" letter because she had been working diligently for several months to address some of the issues about which the partners complained in the letter and they mentioned her by name in the letter. (Tr. 1261; GC Ex. 5). But Jenkins further testified she did not communicate those emotions to the partners nor let those emotions or the letter change the way she worked to meet the needs of her partners. (Tr. 1261). Jenkins said she did not do anything differently in how she managed the 75th Street store following the letter, nor did she treat the partners in that store any differently than she treated the rest of her non-petitioned stores. (Tr. 1262, 1263).

In making the necessary credibility determination, relevant factors include the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003). Here, Edwards's testimony appeared wholly incredible for several reasons. First, Edwards's recollection of the content of the letter was inaccurate in several respects. For example, Edwards erroneously believed statements in her letter related to the nearby

hospitals, and Edwards testified she understood a reference Jenkins made to the hospitals (i.e., Jenkins's statement that "the hospital workers down the street don't close when it snows outside, and Starbucks is one of those companies that doesn't close") was "directly related to a portion of [their] Union letter." (Tr. 290-91). Yet, the letter makes no mention of any hospitals. (GC Ex. 5). Similarly, when recalling the conversation with Jenkins, Edwards first testified Bellis and Seymour were present, then contradicted herself by acknowledging that Bellis had been driving while it snowed to pick up and shuttle partners to and from the store. Other portions of Edwards's testimony were riddled with inaccuracies and inconsistencies, such as her recollection of Bellis's supposed statements concerning the Union at her PDC, which were refuted by the very recordings she had covertly made and which were produced mid-trial. In contrast, Jenkins testified credibly, at times admitting to having made certain remarks that did not reflect upon her the way she would wish. Accordingly, Jenkins's testimony should be credited over Edwards and this allegation should be dismissed in its entirety.

In even if the ALJ credits Edwards's testimony, the statement is well within Jenkins's right to express her own opinion. Section 8(c) clearly provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit." Again, this allegation should be dismissed in its entirety.

h. Linking Poor Work Performance to Union Activities

In Paragraph 6(b) of the Complaint, General Counsel alleged that on February 2, Starbucks, through Sara Jenkins, "[c]oerced employees during a job counseling by linking the poor work performance being counseled to employees' union activities" at the 75th Street store. (Third

Consolidated Compl. ¶ 6(b)). However, there is no record evidence at all supporting this allegation. Indeed, based on how the allegation is worded, it is not clear what statements of Jenkins allegedly linked poor work performance to union activities, and Jenkins expressly denies having made such statements. (Tr. 1283-84). As such, it is clear General Counsel has not met its burden of proof on this allegation.

i. Staffing Shortages

General Counsel made several allegations claiming Starbucks threatened employees with staffing shortages. First, in Paragraphs 11(a)-(c) of the Complaint, General Counsel alleged Starbucks, through Drake Bellis, "threatened employees with staffing shortages if they selected the Union as their bargaining representative" during (i) shift meetings in early February at the 75th Street store, (ii) a PDC held at the 75th Street store on February 14, and (iii) a telephone conversation on February 23. (Third Consolidated Compl. ¶ 11(a)-(c)). Additionally, in Paragraph 18(c), General Counsel alleged that on February 23, Starbucks, through Bellis, "[t]hreatened employees with staffing shortages if employees selected the Union as their bargaining representative" via telephone. (Third Consolidated Compl. ¶ 18(c)). However, there is no credible evidence supporting these allegations. In fact, these allegations are contradicted by the record.

The record demonstrates the 75th Street store experienced significant staffing issues that long preceded union activity at the store. (Tr. 1187). Uncontradicted evidence also established that Jenkins had spoken with former store manager Leeper on multiple occasions to coach her about her deficiencies in addressing the longstanding staffing issues. (Tr. 1187). In November 2021, Jenkins worked with Leeper to develop a plan to address the store's staffing needs by pairing her with mentors and requiring Leeper to send Jenkins weekly updates on what steps she was taking to close staffing and scheduling gaps at the 75th Street store. (Tr. 1188-89, 1191-92; Resp. Ex. 54,

67). Eventually, Jenkins issued Leeper a final written warning for, among other issues, her constant failure to adequately staff and schedule the partners in the store. (Resp. Ex. 62). The existence and content of Leeper's final written warning are also undisputed. The document itself indicates Leeper had not been following scheduling standards. (Tr. 1202; Resp. Ex. 62). Also uncontradicted is Jenkins's testimony concerning Leeper's inability to post schedules timely, her consistent understaffing of the 75th Street store for more than six months, and her absence of urgency in seeking to address the store's staffing issues. (Tr. 1203). That final written warning also held Leeper accountable for not scheduling per the business, meaning not hiring partners with sufficient availability to support the needs of business. (Tr. 1203; Resp. Ex. 62). Jenkins testified, by way of example, that if a day's peak begins at 7 a.m., partners should not be coming in at 8 a.m. and transitioning mid-peak as it causes chaos in the store. (Tr. 1203-04). All events referenced immediately above in this paragraph are (a) uncontradicted and (b) took place prior to any union activities at the 75th Street store.

Equally notable is the fact that the partners at this store themselves acknowledged these longstanding staffing shortages in their "Dear Kevin" letter as well as at the March 3 meeting. (GC Ex. 5; 51 at 40-43). For example, when discussing the staffing shortage at the 75th Street store during the March 3 meeting, Gregg scoffed and stated, "where was that support during the Christmas season?" (GC Ex. 51 at 40).

This allegation is refuted by Bellis's statement during his telephone call with Gregg, "there's not enough people in the store to run it…I don't have enough people to man the store…that factor has nothing to do with the union." (GC Ex. 50 at 12). Far from threatening partners that management would understaff the store as a reprisal for the partners seeking to unionize, Bellis pointed out to Gregg that the staffing shortages long predated the filing of the petition and had

"nothing to do with the union." (GC Ex. 50 at 12). Bellis also stated he was concerned that hiring would become more difficult if partners in his store did not receive raises. So while he did not know whether the store would implement the summer 2022 raises because of his uncertainty about what "status quo" meant under present circumstances, he made clear he viewed that as undesirable because he was desperate to hire additional staff for the store and did not know how he could overcome that problem if the store was not paying higher wages. (GC Ex. 50 at 11-12). Considering Bellis's earlier explanation that an eventual collective bargaining agreement could include wages that were higher, lower, or the same as wages under the status quo, Bellis's statements are properly viewed as a prediction of hiring difficulties that he would encounter if wages were lower than surrounding stores, not a prediction that unionization would lead to lower wages. (GC Ex. 50 at 4-5, 12).

Case law makes clear Bellis's statements acknowledging the existence of staffing issues at the store and voicing his concerns about whether he will be able to remedy the issue were not unlawful. *See, e.g.*, *Kinney Drugs, Inc.*, 314 NLRB 296 (1994) (holding that an employer is free to explain the negotiating process to employees and to share its legitimate economic predictions of the consequences of unionization), *enforcement denied on other grounds and remanded for further proceedings*, 74 F.3d 1419 (2d Cir. 1996); *see also Miller Industries Towing Equipment, Inc.*, 324 NLRB 1074 (2004) (holding employer's statements made the day before an election concerning potential economic consequences were not unlawful because the statements were based on objective facts and devoid of threats or promises; the declining market was a reality of the business downtown about which employees were fully aware and the employer did not violate the Act by acknowledging that reality nor relying on the employer's own past business experiences to make predictions about unionization). These allegations should be dismissed in their entirety.

8. General Counsel Failed to Show Starbucks Unlawfully Interrogated Employees at the 75th Street Store.

In Paragraph 14(b) of the Complaint, General Counsel alleged Starbucks, through Drake Bellis, "[i]nterrogated its employees about their union membership, activities, and sympathies by asking what the Union was promising employees" on February 16, 2022. (Third Consolidated Compl. ¶ 14(b)). This allegation is not supported by any credible record evidence.

Questioning an employee is only unlawful if, under all the circumstances, it would reasonably tend to coerce the employee so that they would feel restrained from exercising their Section 7 rights. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). In evaluating whether an interaction rises to the level of a coercive interrogation, the Board will consider various factors, including: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation. *Rossmore House*, 269 NLRB 1176 (1984) (citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964)).

Starbucks denies Bellis interrogated partners about their union sentiments, much less engaged in coercive interrogation. Only one witness, McCown, testified about interactions with Bellis that even suggested he had interrogated her, and her testimony was wholly incredible. Indeed, the recordings of Bellis's PDC with Edwards included Bellis's explanation of his own understanding of what he could and could not say as a manager in a union campaign environment. (Joint Ex. 3 at 31:17; Joint Ex. 4 at 24:44, 25:27). For example, in Joint Exhibit 4 at 25:27, Bellis can be heard explaining to Edwards, "we are not allowed to make promises." (Joint Ex. 4 at 25:27). Similar statements regarding Bellis's compliance with the Act can be heard elsewhere throughout Bellis's recorded statements. (Joint Ex. 3 at 31:17; Joint Ex. 4 at 24:44, 25:27).

But even if Bellis had asked a partner why they were interested in the Union, that would not have violated the Act. For decades, courts have held that questioning employees about their union or other protected activities is a form of speech. Without the right to ask non-coercive questions, an employer's First Amendment and Section 8(c) speech rights would be impermissibly limited and undermined. The Board and courts reject claims like those made by the Union in this case that such questions are coercive and unlawful.

In *Jacksonville Paper Co. v. NLRB*, 137 F.2d 148 (5th Cir. 1943), a general manager asked an employee whether he belonged to the union, what he expected to gain, and, on a subsequent occasion, whether the union was "washed up." The questioning was not accompanied by any threat or promise. Citing the First Amendment and the Supreme Court's decision in *Virginia Power*, the Fifth Circuit held that an employer "is not precluded by the Act from inquiring or being informed as to the progress of the efforts at unionization." *Id*. at 152.

In *Sax v. NLRB*, 171 F.2d 769 (7th Cir. 1948), a production supervisor asked a striking worker whether she was for the union and why, asked other strikers why they had signed union cards, and asked one why she had not come to the employer if she wanted to have a union. The court held "[s]uch perfunctory, innocuous remarks and queries, standing alone as they do in this case, are insufficient to support a finding of a violation of Section 8(a)(1)" and "come instead within the protection of free speech protected by the First Amendment." *Id.* at 772.

In *Acme Products, Inc. v. NLRB*, 389 F.2d 104 (8th Cir. 1968), upon receiving a demand for recognition, the employer asked two employees what they knew or how they felt about the union. The court held:

> Interrogation is a form of speech. We have no doubt that under appropriate circumstances, interrogation can be coercive and violative of the Act. In our present case, there is no substantial evidence of any coercive interrogation or speech on the

> part of the employer. No threats of reprisal or promises of reward were made. Nothing was said or asked which could reasonably be interpreted as hostile to union activity. Nothing said goes beyond the right of free speech guaranteed by Section 8(c).

Id. at 107-08; *see also NLRB v. Douglas Div., Scott & Fetzer Co.*, 570 F.2d 742, 745 (8th Cir. 1978) ("Section 8(a)(1) cannot be read as a prohibition, per se, of employer questioning of employees relative to unionization. . . . Questioning which does not coerce or restrain employees in their right to organize is permissible; when properly exercised it is protected by the constitutional right to freedom of speech, which is recognized in § 8(c) of the Act."). In view of this longstanding case law, this allegation should be dismissed.

9. General Counsel Failed to Show Starbucks Unlawfully Interfered with, Restrained, or Coerced Employees in the Exercise of Their Section 7 Rights at the Marriott Hotel.

In Paragraph 19 of the Complaint, General Counsel alleged on or about March 3 Starbucks, through Sara Jenkins, "[o]rdered employees engaged in Section 7 activity to cease that activity and leave hotel property," and "[r]equested hotel management call the police on employees engaged in Section 7 activity." (Third Consolidated Compl. ¶ 19(a)-(b)). Irrefutable video evidence shows both allegations are baseless.

Section 8(a)(1) of the Act provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *See Brighton Retail Inc.*, 354 NLRB 441, 447 (2009). Here, Jenkins did not engage in any of the conduct alleged, and both allegations must be dismissed in their entirety.

a. Jenkins Never Ordered Employees to Cease and Leave

The video recorded by Addy Wright begins just prior to Jenkins walking out of the hotel to speak with the partners demonstrating outside. Jenkins can be seen and heard saying, "the hotel is asking you guys to leave." (Joint Ex. 5 at 0:03). An unidentified speaker says, "oh, are they—maybe they can come ask us." (Joint Ex. 5 at 0:05). Jenkins replies, "okay, thank you," turns around and walks back into the building at a normal pace. (Joint Ex. 0:08). As she walks through the doors, an unidentified speaker shouts to Jenkins in a high-pitched voice "Fuck off—Ha Ha." (Joint Ex. 5 at 0:14). A few seconds later, Wright, the one filming the video, asks Fielder, who can be seen on the left side of the frame talking to Orrego, "what did they say?" (Joint Ex. 5 at 0:22). Fielder turns to face the camera and clearly states, "they said—uh—the hotel asked us to leave." (Joint Ex. 5 at 0:23). At the hearing, Counsel for General Counsel asserted that the video was "low quality" and "low audio quality;" however, the video is anything but that and proves—irrefutably—that Jenkins did not order the partners to leave hotel property. (Tr. 1134). She merely communicated what the hotel's management had told her it wanted. Accordingly, this allegation should be dismissed in its entirety.

b. Jenkins Never Asked Hotel Management to Call the Police

Jenkins credibly testified that when she reentered the hotel, "the hotel manager seemed worried and concerned about the situation." (Tr. 1284). Jenkins testified, "I shared with her she could ask them to leave because she was the manager of the place, or she could call the cops." (Tr. 1284-85). By contrast, the former General Manager of the hotel, Marcia Hall, testified Jenkins came in from speaking to the partners "walking fast' and "very hurriedly and frantic and told me to call 911." (Tr. 864). But the irrefutable video evidence shows Jenkins walking calmly back into the hotel, speaking to another individual with brown hair, and slowly turning to walk toward the

front desk. (Joint Ex. 5 at 0:13).

Overall, Hall's testimony appears less than credible. Indeed, Hall—not Jenkins—can be heard in the video threatening the employees by saying "if y'all don't wanna get caught for trespassing you need to leave." (Joint Ex. 5 at 3:05). An unidentified speaker replies to Hall saying, "I thought you just told us to come outside." (Joint Ex. 5 at 3:12). Hall interrupts the individual and says, "yeah, but now we [referring to the people] need to leave." (Joint Ex. 5 at 3:14). Hall can be seen then gesturing with a sweeping motion of her hands away from her body, indicating she's referring to the demonstrators to leave the property. (Joint Ex. 5 at 3:14). Only after this exchange did Hall apologize to the partners, saying "I'm sorry, but yeah—you're—you're gonna need to leave." (Joint Ex. 5 at 3:21). It was Hall, not Jenkins, who decided to call the police. This allegation against Jenkins is baseless and must be dismissed.

Indeed, even if it was Jenkins who called the police—which it was not—such actions do not violate the Act. *See, e.g., Venetian Casino Resort, LLC v. NLRB*, 793 F.3d 85, 90 (D.C. Cir. 2015) (holding no violation of the Act where an employer called the police on picketers).

10. General Counsel Failed to Show Starbucks Violated the Act by Prohibiting Employees from Discussing Discipline.

In Paragraph 14(d) of the Complaint, General Counsel alleged that on February 16, Starbucks, through Drake Bellis, "[p]rohibited employees from discussing discipline." (Third Consolidated Compl. ¶ 14(d)). There is no credible evidence of any such prohibition. Moreover, irrefutable evidence shows McCown was not disciplined on February 16; rather, the documented coaching was delivered on February 26. (GC Ex. 7). There is also no evidence of Bellis taking any adverse actions against anyone for discussing discipline, and instead countless examples of the employees discussing various disciplinary actions amongst one another free from any fear of

retaliation. (*See, e.g.*, 455-58, 487-88; GC Ex. 16).

11. General Counsel Failed to Show Starbucks Violated the Act by Enforcing Its Lawful Recording Policy.

In Paragraph 20(a) of the Complaint, General Counsel alleged that on March 3 Starbucks, through Drake Bellis, "[p]rohibited employees from recording a meeting conducted by Respondent." (Third Consolidated Compl. ¶ 20(a)). Similarly, in Paragraphs 21(a) and (b), General Counsel alleged that on March 11 Starbucks, through Sara Jenkins, "prohibited employees from recording conversations under Respondent's no recording policy" at both its 75th Street store and Shawnee Mission and Quivira store. (Third Consolidated Compl. ¶ 21(a)-(b)). Neither allegation is supported by credible record evidence.

First, regarding Bellis's statements at the March 3 meeting, the uncontradicted evidence shows Bellis merely stated, "we're not recording this, and I ask you not to record this either." (GC Ex. 51 at 26). There is no record evidence Bellis prohibited anyone from recording the meeting, nor is there any evidence of any discipline taken against anyone who did choose to record the meeting or a threat to discipline anyone for recording the meeting. Bellis made a request and his statements and actions are consistent with Starbucks' Video Recording, Audio Recording, and Photography policy, which provides, "Personal video recording, audio recording, or photographing of other partners or customers in the store without their consent is not allowed ***except as protected under federal labor laws***."

Indeed, facially neutral policies prohibiting recordings in the workplace are lawful where their potential to impact protected activity is slight. *AT&T Mobility, LLC*, 370 NLRB No. 121 (May 3, 2021); *cf. G&E Real Est. Mgmt. Servs., Inc.*, 369 NLRB No. 121 (2020). Starbucks' policy explicitly provides that recording "as protected under federal labor laws" is permitted. Bellis

requested partners not record the meeting but did not tell them they were prohibited from recording the meeting, threaten adverse consequences for recording the meeting, or in any way coerce partners to prevent them from recording the meeting. Bellis also articulated the employer's compelling interest in applying the policy, explaining that the meeting was designed to be a "safe space" and "this is going to be an open environment to ask questions that are constructive….in a recorded environment, someone might not feel comfortable doing that." Bellis's statements were consistent with Starbucks' interest in maintaining a respectful workplace in which partners are not recorded "without their consent."

The Board has found employers have a "keen interest" in maintaining such rules, even where they "overbroadly encompass recordings made for one's mutual aid and protection." *G&E Real Est. Mgmt. Servs., Inc.*, 369 NLRB No. 121 (2020). Here, where the policy is specifically narrowed to avoid infringing on protected concerted activity and the policy was not applied adversely to those who recorded the March 3 meeting, the policy and Bellis's request that partners refrain from recording without consent were lawful. Likewise, regarding Jenkins's alleged statements concerning the recording policy, there is also no record evidence of any disciplinary actions taken against anyone for making any recordings. It follows that these allegations must be dismissed.

12. General Counsel Failed to Show Starbucks Made Any Unlawful Statements of Futility.

a. Bloomberg Law's Estimate of an Average of 409 Days to Negotiate a First Contract

In Paragraph 14(c) of the Complaint, General Counsel alleged Starbucks, through Drake Bellis, violated the Act on February 16, "[b]y telling employees contract negotiations can take over 400 days," thereby "inform[ing] its employees that it would be futile for them to select the

Union as their bargaining representative." (Third Consolidated Compl. ¶ 14(c)). The allegation is not supported by any of the record evidence as Bellis's statements constitute lawful, objective statements of fact about the collective bargaining process, protected by Section 8(c) of the Act.

"[A]bsent threats or promise of benefit, an employer is entitled to explain the advantages and disadvantages of collective bargaining to its employees in an effort to convince them that they would be better off without a union." *Winkle Bus Co., Inc.*, 347 NLRB 1203, 1205 (2006) (citing *Langdale Forest Prods. Co.*, 335 NLRB 602 (2001)). However, an employer may not make any unlawful threats of futility by stating or implying it will resort to unlawful means to ensure its nonunion status. *See Ready Mix, Inc.*, 337 NLRB 1189, 1190 (2002).

In *Winkle Bus Co., Inc.*, the Board concluded an employer's rhetorical statement "Do you want to wait for years for a raise like those people?" did not constitute an unlawful statement of futility. 347 NLRB 1203, 1205 (2006). In so holding, the Board reasoned the statement did not violate the Act because it merely "lawfully identified one of the possible consequences of unionization, i.e., that collective bargaining might have to run its course before employees received any raises." *Id.* The Board emphasized the employer neither stated nor implied it would "ensure its nonunion status through unlawful means, or that it would withhold raises that employees would otherwise receive in retaliation for their decision to choose union representation." *Id.* Thus, nothing about the statement constituted a threat of futility. The same is even more true here.

The uncontradicted record evidence shows Bellis made statements regarding the average length of time it takes to negotiate a first contract as roughly around 400 days. (Tr. 93, 673, 675; GC Exs. 18, 28, 49, 50 at 7-8, 51 at 32-33). However, the record also contains specific, credible evidence identifying what Bellis relied upon in making those statements. (GC Ex. 51 at 32-33). Specifically, in the recordings and transcript from the March 3 meeting, Bellis identified the source

of his statement when he said, "Bloomberg Law estimates the first contract takes on average 409 days." (GC Ex. 51 at 32-33). *See* Robert Combs, *Analysis: How Long Does It Take Unions to Reach First Contracts*, Bloomberg Law News (June 1, 2021) (noting "[b]y cross-referencing two of the databases in Bloomberg Law's Labor PLUS resource and calculating an average, we can pinpoint the average number of days it takes new union locals and their employers to sign that initial CBA. It's well over a year: 409 days, to be exact.").

Bellis's statements regarding the average length of time to negotiate a first contract were based on statistics published in a reliable study in which Bloomberg Law analyzed years' worth of collective bargaining agreements from various industries and compiled statistics estimating the average length of time it takes to negotiate a first collective bargaining agreement. Recently, Bloomberg has updated its study and now predicts the average length of time to negotiate a first contract is even longer, estimating 465 days now as opposed to 409. *See* Robert Combs, *Analysis: Now It Takes 465 Days to Sign a Union's First Contract*, Bloomberg Law News (Aug. 2, 2022). As such, the statements fall squarely within the type of 8(c) statements contemplated by the Supreme Court in *Gissel*. 395 U.S. at 618 (a prediction based upon "objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control" is lawful). Therefore, the allegation that Bellis violated the Act for making such statements as set forth in Paragraph 14(c) of the Complaint must be dismissed.

b. Rhetorical Question About Whether the Team Would Look the Same 400 Days from Now Based upon the 75th Street Store's Turnover Rate of 122 Percent

In Paragraph 20(b) of the Complaint, General Counsel alleged Starbucks, through Drake Bellis, violated the Act on March 3 "[b]y stating most current employees will not be working for Respondent when a collective-bargaining agreement is agreed upon," and thereby "informed its

employees that it would be futile for them to select the Union as their bargaining representative." (Third Consolidated Compl. ¶ 20(b)). However, the uncontradicted evidence shows Bellis did not word his statements in the manner alleged in the Complaint. Instead, the recordings and transcript admitted as General Counsel Exhibits show the conversation unfolded other than how it is characterized in the Complaint and that nothing about Bellis's statements at the March 3 meeting were unlawful statements of futility or otherwise violated the Act.

A statement of futility is unlawful where the employer suggests that it will use unlawful means to avoid unionization or bargaining. *See Libertyville Toyota*, 360 NLRB No. 141, slip op. at 1 (2014) (finding a threat of futility where an employer suggested that "bargaining might never begin" and employees would lose benefits not because of the uncertainties of collective bargaining but because they selected a union), *enfd. sub nom. AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015); *Winkle Bus Co.*, 347 NLRB 1203, 1204 (2006) ("An unlawful threat of futility is established when an employer states or implies that it will ensure its nonunion status by unlawful means.") (citing *Ready Mix, Inc.*, 337 NLRB 1189, 1190 (2002)); *Venture Industries*, 330 NLRB 1133, 1133 (2000) (manager unlawfully conveyed that unionization would be futile by telling employees that "as far as he was concerned the plant would never be a union shop" during a speech in which he also threatened loss of jobs and loss of promotional opportunities).

Here, General Counsel Exhibit 51 shows Bellis's statements were nothing more than lawful economic predictions regarding unionization at the 75th Street store based upon objective facts. The recordings show that during a contentious conversation about the ratification process for a collective bargaining agreement, Bellis made a rhetorical statement, "Um, and, again, the people in this room right now, of—of the people in here, you know, how many of you have been here for 400 days? You know, like-- um." (GC Ex. 51 at 38). Bellis's statement clearly referred to his

earlier statement regarding Bloomberg Law's estimated length of time it takes to negotiate a first contract (i.e., "Bloomberg Law estimates the first contract takes on average 409 days." (GC Ex. 51 at 32-33)). As explained above, Bellis's initial statement was based upon objective, verifiable facts. *See* Robert Combs, *Analysis: Now It Takes 465 Days to Sign a Union's First Contract*, Bloomberg Law News (Aug. 2, 2022); Robert Combs, *Analysis: How Long Does It Take Unions to Reach First Contracts*, Bloomberg Law News (June 1, 2021). Then, Bellis explained to the partners—in response to their retort—that he was not implying they were somehow disposable but, rather, that he was concerned about the future based on the store's turnover rate of 122 percent. (GC Ex. 51 at 39) ("The environment at the store though . . . for one way or another . . . is causing turnover at 122 percent, and so that is concerning for me."). Indeed, in the moment, McCown acknowledged the validity of Bellis's statement regarding the store's turnover rate stating "[i]t is, and I agree with that." (GC Ex. 51 at 39). It follows that Bellis's statement constituted a lawful prediction regarding unionization at the store based upon objective, verifiable facts.

Jenkins also clarified Bellis's statements: "It's not about you guys leaving the store. It's about the people that we need to bring on to support the business of the location that's changing the dynamic of the store, as well." (GC Ex. 51 at 40). Starbucks has a highly mobile workforce and hiring, transfers, and separations occur at a rapid pace in the ordinary course, without regard for union activity. It was then, as Bellis and Jenkins pointed out, highly unlikely that the team voting on the representation petition would be the exact same team governed by a collective bargaining agreement if the partners voted to unionize and reached a collective bargaining agreement in the normal course as indicated by the data reported in Bloomberg's report. These facts distinguish this case from those in which statements regarding the amount of time that is required to reach a contract are found unlawful.

For example, in *Valerie Manor, Inc. & New England Health Care Emps. Union, Dist. 1199, SEIU*, 351 NLRB 1306, 1318 (2007), the employer threatened to close its facility and in that context the Board found that a communication asking, "How long does the bargaining process take? Weeks? Months? Years? How long could you wait?" was an unlawful threat of futility. Here, in contrast, the employer referenced the average length of time for collective bargaining as reported in a well-known and reputable publication and the current rate of turnover at the store, both objective facts set forth without concomitant threats or coercive statements. Such statements, unaccompanied by unlawful speech, are protected under Section 8(c) of the Act, which provides the "expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . .if such expression contains no threat of reprisal or force or promise of benefit." *Gissel*, 395 U.S. at 618; *cf. Trinity Servs. Grp., Inc. & United Food & Com. Workers Union, Loc. 99*, No. 28-CA-212163, 2018 WL 5840167 (Nov. 7, 2018) ("because the comments were not made contemporaneously with, or linked to, any explicit or implicit threats, while obnoxious, they do not constitute a threat of futility").

A threat of futility exists when an employer threatens that it will take action on its "own initiative" that will render unionization futile. *See Federated Logistics & Operations, a Div. of Federated Corp. Servs., Inc. v. NLRB*, 400 F.3d 920, 925 (D.C. Cir. 2005). A futility threat is utterly absent here. Bellis and Jenkins made clear that their statements regarding the likelihood of change in personnel was based upon actual turnover rates and hiring in the context of staffing shortages. Bellis stated, "I absolutely don't [think partners are disposable]," and agreed that many partners on the team "really love Starbucks." Jenkins further clarified that with the need to hire "eight to ten partners" to "support the business of the location" "we're creating a different dynamic with a different team." (GC Ex. 51 at 40).

Even if, *arguendo*, the initial question "is this gonna be the same team here in 400 days?" could reasonably be interpreted as a threat of futility—which it cannot—the statements by Bellis and Jenkins mere seconds later that the question was based on the current "turnover rate" and the need to hire "eight to ten" new partners and was "not about you guys leaving the store" makes crystal clear that management was not threatening to take any unlawful action. Under Board law, it is well-established an employer may effectively repudiate unlawful statements if the repudiation is "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977); *see also Kawasaki Motors Corp.*, 231 NLRB 1151, 1152 (1977). Here, the Company, through both Bellis and Jenkins, immediately disclaimed any possible inference that its rhetorical question was an implicit threat by stating the question was "not about you guys leaving the store." (GC Ex. 51 at 39-40). Accordingly, although Starbucks maintains that any such inference is insupportable, even if the initial question posed could have given rise to an arguably unlawful statement of futility, Bellis and Jenkins explicitly and specifically repudiated that statement within seconds to the entire audience. As such, the allegation must be dismissed.

13. General Counsel Failed to Show Starbucks Unlawfully Discriminated Against Hannah McCown by Requiring Increased Availability on February 15.

In Paragraph 26 of the Complaint, General Counsel alleged that on or about February 15, Starbucks "required Hannah McCown increase her work availability or be demoted or resign" because "the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." (Third Consolidated Compl. ¶ 26(a)-(b)). All credible record evidence, most of which is uncontradicted, proves otherwise.

General Counsel's theory of the case is that Starbucks first unlawfully reduced McCown's hours in response to her union activities, thereby forcing her to obtain a second job, and then refused to accommodate her limited availability that grew out of the initial reduction in her hours. The record is replete with uncontradicted evidence refuting this allegation. For example, General Counsel Exhibit 46(a) directly contradicts McCown's testimony regarding her scheduled hours during Leeper's tenure at the store and her alleged reduction in hours. (GC Ex. 46(a)); *see also* Table and Discussion *supra* in Section IV.B.8 (summarizing McCown's time record data).

When Jenkins first spoke to McCown about her limited availability on February 15, McCown had already scheduled her interview with Farmers Insurance, a fact she acknowledged having shared with Bellis during her PDC on February 16.

Beyond that, McCown's time records show she never experienced any dramatic reduction in hours, as she claimed during her testimony. In fact, the time records call into doubt McCown's truthfulness as they wholly disprove her testimony concerning her prior work history. McCown testified she "first noticed it [the reduction in her hours] in the schedule for the week of February 14th[,]" and that prior to the week of February 14, she had been working "approximately 35 hours a week." (Tr. 85, 86). McCown claimed the scheduling of her February 14 work week for just twenty-one hours constituted a dramatic reduction in hours, prompting her to apply for the job at Farmers Insurance. (Tr. 86). This just was not so!

As set forth in the Table *supra*, compiled from the data contained in General Counsel Exhibit 46(a), during the roughly sixteen weeks in which McCown worked at the 75th Street store before the alleged "reduction" on February 14, McCown averaged only sixteen hours per week—an amount far less than the thirty-five hours per week McCown claimed in her testimony. Scheduling McCown for twenty-one hours the week of February 14, based upon her historical

work data in the preceding weeks, constituted an increase in hours, not a reduction. (*See* GC Ex. 46(a)). The records also indicate that during at least three of those sixteen weeks, McCown worked no hours at all at the 75th Street store. Yet, even if those weeks are removed, she still averaged no more than 19.7 hours a week, leaving her average weekly hours still far below the amount she wrongly claimed during her testimony.

Section 8(a)(3) of the Act prohibits employers from discriminating in an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer thus violates Sections 8(a)(3) and (1) of the Act by disciplining employees for antiunion reasons. *Equitable Resources*, 370 NLRB 730, 731 (1992). To establish a violation of Section 8(a)(3) and (1) in cases where a discipline is alleged, General Counsel has the burden of proving that the disciplinary action was motivated by employer antiunion animus under the Supreme Court-approved standard found in *Wright Line*, 251 NLRB 1083 (1980). *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). The framework established by the Board in *Wright Line* is a causation test. It requires proof by a preponderance of the evidence that an employee's union or other protected concerted activity was a motivating factor in the employer's decision to effect an adverse employment action against an employee. Here, not only has General Counsel failed to show causation, but she also likewise failed to present any credible testimony establishing that Starbucks reduced McCown's hours, let alone that Starbucks did so because of McCown's protected activity. It follows that McCown's limited availability did not result from anything Starbucks did to her. To the contrary, McCown voluntarily chose to limit her own availability to accommodate the hours of her new job.

And yet, critically, Starbucks did not separate McCown for no longer meeting the availability requirements of a shift supervisor. Credible record evidence establishes Starbucks

regularly expects its shift supervisors to maintain sufficient availability at times conducive to the needs of the business. (Tr. 1266; Resp. Ex. 7). Jenkins expects her shift supervisors to work a minimum of twenty-eight hours a week and to be available for at least thirty-four hours during the week. (Tr. 1266). She also testified regarding her expectation about shift supervisor availability to work during "peak" times. (Tr. 1266). Record evidence further shows Starbucks expects all partners, including shift supervisors, to maintain and update their availability in the scheduling system, Starbucks Partner Hours. (Resp. Exs. 7, 9; Joint Ex. 3). Store Managers, in turn, use that information to build schedules and should "[c]onsistently post schedules three weeks out" (Resp. Ex. 9 at 2). Thus, Starbucks would have been more than justified in separating McCown for no longer being able to fulfill the basic availability requirements of a shift supervisor. Instead, Starbucks accommodated McCown's **requests** to voluntarily demote to a barista position, which did not have the same requirements concerning availability, and allowed her to continue her employment at Starbucks. If Starbucks had sought to rid itself of McCown, she handed Starbucks the opportunity to do so on a silver platter. That Starbucks did not avail itself of the opportunity to discharge McCown but, instead, offered her an alternative to continue her employment with it refutes General Counsel's allegations.

It appears that General Counsel thought it could portray Starbucks as a cunning union buster that set up McCown for failure by causing her to reduce her availability and then availed itself of the "set up" by giving her a Hobson's choice of demotion or discharge. The reality is that McCown became busy, sought out and secured a second job, through her own actions reduced her availability, and knew that she would have to demote to a Barista because she no longer satisfied the availability requirement to remain a shift supervisor. Starbucks did nothing wrong and, in fact, it sought to continue her employment with it even though she engaged in protected activity. Based

upon all the credible record evidence, General Counsel's allegation has no basis in fact or law and must be dismissed.

14. General Counsel Failed to Show Starbucks Unlawfully Discriminated Against Hannah McCown by Issuing a Documented Coaching on February 16th.

In Paragraph 27 of the Complaint, General Counsel alleged that on or about February 16, Starbucks "issued a documented coaching to McCown" because "the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." (Third Consolidated Compl. ¶ 27(a)-(c)). There is no credible evidence supporting this allegation.

Section 8(a)(3) of the Act prohibits employers from discriminating in an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer thus violates Sections 8(a)(3) and (1) of the Act by disciplining employees for antiunion reasons. *Equitable Resources*, 370 NLRB 730, 731 (1992). To establish a violation of Section 8(a)(3) and (1) in cases where unlawful discipline is alleged, General Counsel has the burden of proving that the disciplinary action was motivated by employer antiunion animus through the Supreme Court-approved standard found in *Wright Line*, 251 NLRB 1083 (1980). *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). The framework established by the Board in *Wright Line* is a causation test. It requires proof by a preponderance of the evidence that an employee's union or other protected concerted activity was a motivating factor in the employer's decision to take adverse employment action against the employee. General Counsel has not—and cannot—show any causation here.

General Counsel failed to show the issuance of the documented coaching (the lowest form of written discipline at Starbucks) to McCown on February 16 had anything to do with her

protected activities. To the contrary, the credible record evidence shows Starbucks has maintained and consistently enforced a lawful dress code policy for years, as explained at length above. Indeed, Calvin Culey and Chris Fielder, partners with far less tenure than McCown, both credibly testified regarding Starbucks' prohibition on "soft top shoes," as opposed to plastic or leather, because they present a burn hazard. (Tr. 893).

Likewise, Bellis has consistently enforced dress code at his stores prior to arriving at the 75th Street store. Bellis testified credibly regarding his big three standards in stores, which included enforcement of dress code standards. Bellis further testified he spoke with the shift supervisors about dress code enforcement just one day earlier and yet McCown still chose to report to work out of dress code the very next day (which was when she committed the dress code infraction for which she was coached). As such, her documented coaching was based on a legitimate, non-retaliatory motive and no record evidence exists indicating unlawful animus motivated that discipline's issuance. Therefore, this allegation should be dismissed.

It is also worth noting that McCown received another, separate documented coaching following her final written warning in late March. However, General Counsel has not alleged its issuance violated the Act despite long being on notice of its existence. Likewise, at trial, General Counsel did not move to conform the Complaint to the evidence presented. However, to the extent General Counsel seeks to raise issue with respect to McCown's second documented coaching in its Post-Hearing Brief, any such effort should be rejected both as untimely and as not supported by any of the credible record evidence presented at trial.

15. General Counsel Failed to Show Starbucks Unlawfully Discriminated Against Hannah McCown by Issuing a Final Written Warning on March 11th.

In Paragraph 29 of the Complaint, General Counsel alleged that on or about March 11

Starbucks "issued a final written warning to Hannah McCown" because "the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." (Third Consolidated Compl. ¶ 29(a)-(b)). All credible record evidence proves otherwise.

Section 8(a)(3) of the Act prohibits employers from discriminating in an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer thus violates Sections 8(a)(3) and (1) of the Act by disciplining employees for antiunion reasons. *Equitable Resources*, 370 NLRB 730, 731 (1992). To establish a violation of Section 8(a)(3) and (1) in cases where unlawful discipline is alleged, the General Counsel has the burden of proving that the disciplinary action was motivated by employer antiunion animus through the Supreme Court-approved standard found in *Wright Line*, 251 NLRB 1083 (1980). *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). The framework established by the Board in *Wright Line* is a causation test. It requires proof by a preponderance of the evidence that an employee's union or other protected concerted activity was a motivating factor in the employer's decision to take an adverse employment action against the employee. General Counsel has not—and cannot—show any causation here.

Uncontradicted record evidence shows Starbucks maintains robust safety and cash management policies and procedures to minimize loss and keep its partners, customers, and property safe. (Tr. 1288-92, 1504-08, 1514; Resp. Exs. 2, 3, 4, 8, 10, 23, 24, 76, 77, 78, 79). Uncontradicted record evidence further establishes that McCown committed a substantial violation of Starbucks' safety and cash handling policies when she left cash outside of the safe overnight at the 75th Street store. (Tr. 1445-56; GC Ex. 15). McCown admitted to doing so, and further admitted the cash handling violations were serious violations of Starbucks' policies. (Tr. 145, 187).

The record also contains substantial credible evidence regarding McCown's call with Jenkins on March 7, which was referenced in her Final Written Warning. On March 7, Jen Seymour's first day as Store Manager at the 75th Street store, McCown called Seymour to attempt to persuade her to turn off the mobile order and pay system. (Tr. 1269). Seymour, still unsure of the protocol for turning off mobile orders, told McCown to call Jenkins instead to obtain such permission. (Tr. 1269). When speaking with Jenkins, McCown pretended not to understand what the Daily Coverage Report was when Jenkins asked her to obtain it; however, McCown had no trouble identifying that document at trial and video McCown herself covertly recorded of her discussion with Jenkins irrefutably reveals the Daily Coverage Report was in her custody, front and center, during the entirety of both telephone calls with Jenkins. (Tr. 1269; Resp. Ex. 65).

McCown, a long-time shift supervisor, was not credible when she testified she was unfamiliar with Daily Coverage Report, and likewise was not credible regarding her alleged inability to figure out how to use the speakerphone when asked why she only recorded some, but not all, of Jenkins's portion of the conversation. (Tr. 221-22). Instead, what is clear is McCown selectively recorded portions of her conversation with Jenkins and omitted others to avoid record evidence showing why Jenkins was frustrated with her.

McCown likewise did not testify credibly regarding how long she remained in the store following her phone call with Seymour, claiming she stayed in the store for at least one or more hours after her phone call with Jenkins. However, the time records definitively prove otherwise. McCown went home immediately after her second call with Jenkins at 2:15 p.m., a mere 45 minutes after first clocking in for her shift at the store that day. (*See* GC Ex. 46(a) at "Hannah McCown 03/07/2022 Shift End" Entry on pg. "Starbucks #20346 – 000783").

At the time, McCown wanted to turn off mobile orders so she would not have to service

many customers that afternoon. When Jenkins did not agree to do so because the store's predictive data sets projected low sales that day, rather than complete her shift McCown instead called Seymour back, claimed she had vomited and was sick, and insisted that she needed to go home immediately, thereby forcing the store to close early. (Resp. Ex. 13). When McCown was speaking with Jenkins, nothing suggested she was ailing. In any event, Jenkins determined that this set of events, in conjunction with the serious cash management deficiencies, warranted a Final Written Warning.

General Counsel did not meet its burden under *Wright Line*. Merely showing that Starbucks is aware of a partner's Union activities is not enough. Here, there is no direct evidence of animus connected to the conduct in issue. And none of the typical indicia to which the Board looks to infer animus are present—i.e., there is no "showing of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behaviors for which the employee was allegedly fired" or "disparate treatment of the discharged employee." *Medic One, Inc.*, 331 NLRB 464, 475 (2000).

Starbucks is entitled to enforce its policies, including its policies regarding schedule integrity, insubordination, and cash handling. As the Board has properly recognized, strong facts supporting the employer's lawful motivation seriously undercut allegations of retaliatory motive. *See, e.g.*, *E.A. Sween Co.*, 2009 NLRB LEXIS 332 (ALJ Buxbaum, 2009). As Jenkins and Seymour both credibly testified, at the time of the issuance of McCown's Final Written Warning, Jenkins was already investigating almost $20,000 in unverified deposits, at least one missing deposit, several cash variances (most, if not all, of which were shortages), missed courier log entries, and other serious issues surrounding the 75th Street store's cash handling practices, causing Jenkins to look critically at opportunities in the store for partners to improve in their cash

handling practices. Jenkins credibly testified she would have taken the same actions with respect to McCown absent any protected activity. In short, there is simply no credible evidence from which to infer that Starbucks acted unlawfully in issuing McCown's final written warning and the allegation should be dismissed.

16. General Counsel Failed to Show Starbucks Unlawfully Discriminated Against Hannah Edwards by Requiring Increased Availability on March 11th.

In Paragraph 30 of the Complaint, General Counsel alleged that on or about March 11, Starbucks "required Hannah Edwards increase her work availability or be demoted or resign" because "the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." (Third Consolidated Compl. ¶ 30(a)-(b)). There is no credible evidence supporting this allegation.

As explained above, credible record evidence shows Starbucks expects its shift supervisors to maintain sufficient availability at times conducive to the needs of the business. (Tr. 1266; Resp. Ex. 7). Although store managers strive to balance partner availability with business needs when creating schedules, Starbucks does not guarantee nor does it make any assurances "that hourly partners will receive their preferred hours or shifts, the same schedule each week, a minimum or maximum number of hours, or that a request for a schedule change will be approved." (Resp. Ex. 7). According to Jenkins, shift supervisors are expected to work a minimum of twenty-eight hours a week and to be available for thirty-four hours during the week. (Tr. 1266). Likewise, shift supervisors should be available to work during "peak" times and not first begin a shift during the middle of "peak" business times. (Tr. 1266).

Regarding scheduling, all partners, including shift supervisors, are expected to maintain their availability in the scheduling system. (Resp. Exs. 7, 9). Store Managers, in turn, use that

information to build schedules and should "[c]onsistently post schedules three weeks out" (Resp. Ex. 9 at 2). Store Managers also share responsibility for "[e]nsur[ing] partner availability is accurately reflected in the scheduling system" (Resp. Ex. 9 at 2).

According to Edwards, Jenkins arrived at the 75th Street store on March 11 and spoke with Edwards about her availability. (Tr. 311). Edwards testified Jenkins told her they were "working on figuring out how many supervisors were really needed at every store[,]" and that Edwards's availability "no longer worked for Starbucks." (Tr. 313). At no point during Edwards's testimony did she acknowledge having already reduced her availability to below the minimum requirements for a shift supervisor. However, the covert recordings Edwards made of her PDC with Bellis irrefutably show that to accommodate her increasingly busy schedule (including two other jobs and college classes), Edwards asked Bellis to update her availability in Partner Hours to narrow her available times. (Joint Ex. 3 at 1:24 and at 20:53). Those updates occurred on February 16, prior to Jenkins's conversation with Edwards. Moreover, during her PDC, Edwards acknowledged that some managers would not allow Edwards to reduce her hours as requested. (Joint Ex. 3 at 7:50). Because Seymour, and not Bellis, would be making the store schedule, Bellis was not able to approve McCown's request during the PDC, but he did what he could by mapping out for Edwards what she should do to update her availability in the scheduling system. (Joint Ex. 3 at 1:24).

Edwards's testimony, like McCown's testimony, is not credible regarding her prior scheduling arrangements with Leeper. McCown testified that in January 2022 her schedule was "consistently" "Monday, Wednesday, Friday 5:00 a.m. to 10:00 a.m., and Saturdays 5:00 a.m. until 1:30 p.m." (Tr. 261). As shown *supra*, General Counsel Exhibit 46(a) directly contradicts Edwards's testimony. (GC Ex. 46(a)). In fact, the data shows a marked difference between

Edwards's availability after she was hired in October 2021, when she was averaging thirty hours a week, and when Jenkins spoke to Edwards on March 11, when she was only averaging eighteen hours a week, far below the requisite twenty-eight to thirty-five hours a week expected of shift supervisors. (GC Ex. 46(a)).

Accordingly, like the conversation Jenkins had with McCown, Jenkins likewise had a discussion with Edwards about her limited availability, reiterating the expectation for shift supervisors and giving her the option to continue employment as a barista, a position which did not have the same availability requirements, if Edwards could not increase her availability to the required number of hours.

Applying the *Wright Line* framework, General Counsel has not shown, based upon the above facts, any disparate treatment or discriminatory employment action based upon union animus. Nor has General Counsel proven causation. Nothing in the any of the credible record evidence allows even an inference of retaliatory animus in Jenkins accommodating Edwards's voluntary decision to work other jobs and limit her availability at Starbucks. As she did with McCown, Jenkins offered Edwards an opportunity to continue employment at Starbucks with her requested reduced hours as a barista, rather than a shift supervisor. (Tr. 418). Edwards then ***chose*** to open up her availability as she did not want to demote to a barista role. (Tr. 366-67). During her PDC with Bellis on February 16, long before the discussion with Jenkins, Edwards also acknowledged having already considered whether demotion would be appropriate for her based on her limited availability. (Joint Ex. 3 at 20:53) ("I've thought about stepping down to barista"). As a result, the allegation should be dismissed.

17. General Counsel Failed to Show Starbucks Unlawfully Discriminated Against Hannah McCown by Reducing Her Hours on March 15th.

In Paragraph 31 of the Complaint, the General Counsel alleged that on or about March 15 Starbucks "reduced Hannah McCown's scheduled hours per week and failed to abide by scheduling commitments" because "the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." (Third Consolidated Compl. ¶ 31(a)-(b)). However, all the credible record evidence proves this allegation is utterly baseless.

Section 8(a)(3) of the Act prohibits employers from discriminating in an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer thus violates Sections 8(a)(3) and (1) of the Act by disciplining employees for antiunion reasons. *Equitable Resources*, 370 NLRB 730, 731 (1992). To establish a violation of Section 8(a)(3) and (1) in cases where unlawful discipline is alleged, General Counsel has the burden of proving that the disciplinary action was motivated by employer antiunion animus through the Supreme Court-approved standard found in *Wright Line*, 251 NLRB 1083 (1980). *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). The framework established by the Board in *Wright Line* is a causation test. It requires proof by a preponderance of the evidence that an employee's union or other protected concerted activity was a motivating factor in the employer's decision to take an adverse employment action against the employee. General Counsel has not—and cannot—show any causation here.

First, there is no record evidence pinpointing the significance of March 15 to McCown's claims. To the contrary, the testimony and exhibits admitted into the record indicate McCown had already sought to reduce her hours long before March 15, first limiting her availability only to

weekends and evenings after 5:00 p.m., then only to four-hour windows in the evenings. Indeed, credible record evidence shows that even when evening weekday shifts did open, such as when Doran needed coverage for her shift on March 23, McCown declined to pitch in and work those shifts.

Jenkins credibly testified that prior to March 15th, McCown had already discussed stepping down to a barista because she had gotten another job and she was only going to be available for the weekends. (Tr. 1274-75). Jenkins explained, even before the March 7 phone call, Jenkins had already explained to McCown that Jenkins did not know what McCown's pay would be after the demotion McCown had requested. (Tr. 1275). Jenkins explained that when you process a partner's request in their "MMS" system, the system calculates the appropriate wage for the partner taking into consideration various factors, including the partner's tenure with Starbucks. (Tr. 1275).

The record evidence also shows that when Starbucks did provide McCown with shifts within her extremely limited availability, McCown would often find an excuse to leave early or show up late. For example, on March 20, McCown did not show up until an hour and a half after her shift was scheduled to begin, leading to the issuance of another documented coaching. Then, when she did show up, she stayed for only a few hours before abruptly leaving the store without providing any notice to the Store Manager. (Resp. Ex. 36). At the time, McCown informed Doran she was having a mental breakdown and needed to leave immediately, but later she changed her story and claimed she needed to leave because she was experiencing Covid symptoms. (*Compare* GC Ex. 20 *with* Resp. Ex. 36). Despite already having issued McCown a Final Written Warning at that time, Starbucks' only response was to conduct a documented coaching for leaving work early without notice: the circumstances would have justified Starbucks separating McCown, but it did not do so despite her protected conduct. (Resp. Ex. 36). The reason is simple: Starbucks did

not care that she had engaged in protected conduct and, as should be apparent, the management team's only interest was in running the store proficiently. Because the evidence overwhelmingly shows McCown's allegations of unlawful reduction of hours and constructive discharge have no merit, these allegations should be dismissed in their entirety.

18. General Counsel Failed to Show Starbucks Unlawfully Discriminated Against Maddie Doran by Issuing a Final Written Warning on March 26th.

In Paragraph 32 of the Complaint, the General Counsel alleged that on or about March 26, Starbucks "issued a final written warning to Maddie Doran" because "the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." (Third Consolidated Compl. ¶ 32(a)-(c)). Credible record evidence shows Starbucks acted lawfully in the issuance of a final written warning to Maddie Doran.

Section 8(a)(3) of the Act prohibits employers from discriminating in an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer thus violates Sections 8(a)(3) and (1) of the Act by disciplining employees for antiunion reasons. *Equitable Resources*, 370 NLRB 730, 731 (1992). To establish a violation of Section 8(a)(3) and (1) in cases where unlawful discipline is alleged, General Counsel has the burden of proving that the disciplinary action was motivated by employer antiunion animus through the Supreme Court-approved standard found in *Wright Line*, 251 NLRB 1083 (1980). *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). The framework established by the Board in *Wright Line* is a causation test. It requires proof by a preponderance of the evidence that an employee's union or other protected concerted activity was a motivating factor in the employer's decision to take an adverse employment action against the employee. General Counsel has not—

and cannot—show any causation here.

Indeed, Seymour and Jenkins both provided credible evidence regarding the substantial issues uncovered during the investigation into the store's unverified deposits leading to the discovery of Doran's recurring cash handling negligence, including her failure to complete the courier log, multiple substantial cash shortages totaling $378.79, and schedule integrity issues. (Tr. 1294, 1584). Unlike the situation with the unverified deposits, for which Doran was *not* held accountable, the cash shortages were all traced directly to Doran. (Tr. 1294, 1584). Specifically, Jenkins learned the deposits from the following dates were short by the following amounts: 12/07/2021 (-$68.78), 01/09/2022 (-$150.66), 01/11/2022 (-$94.80), and 02/10/2022 (-$64.55). (GC Ex. 21).

Additionally, relying upon the Partner Resources Department, which conducted a separate and thorough investigation, Jenkins issued Doran a Final Written Warning. (Tr. 1585-86). *See, e.g.*, *Andronaco*, 364 NLRB No. 142 (2016), slip op. at 14 (absence of an investigation prior to an alleged discriminatory decision may show animus). Further still, rather than terminate Doran for the substantial cash handling issues, Jenkins chose not to do so to give Doran an opportunity to overcome her deficiencies and improve because Jenkins felt Leeper's poor leadership could have contributed to Doran's negligent cash handling issues. (Tr. 1585). Had Jenkins harbored animus toward Doran and wanted to fire her, she could have done so then, rather than issue a Final Written Warning, based upon the serious policy violations Doran had committed. Yet Jenkins chose not to do so. All these facts show Starbucks acted lawfully in disciplining Maddie Doran and the allegation should be dismissed in its entirety.

19. General Counsel Failed to Show Starbucks Unlawfully Terminated Alydia Claypool.

In Paragraph 33 of the Complaint, General Counsel alleged that on or about March 28 Starbucks "discharged Alydia Claypool" because "the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." (Third Consolidated Compl. ¶ 33(a)-(b)). However, credible record evidence shows Starbucks lawfully terminated Claypool. More importantly, prior to the filing of this Complaint, Starbucks had already reinstated Claypool with full backpay based upon its own processes permitting a discharged employee to appeal and seek reinstatement. Finding an unfair labor practice here, when there is no unremedied adverse action, does not further any purpose of the Act, nor does it encourage employers to take remedial measures during the pendency of an unfair labor practice charge. The inclusion of this allegation, along with other baseless allegations in the Complaint, is part of a larger agenda to try to justify a *Gissel* bargaining order in a case that does not warrant one.

Section 8(a)(3) of the Act prohibits employers from discriminating in an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer thus violates Sections 8(a)(3) and (1) of the Act by disciplining employees for antiunion reasons. *Equitable Resources*, 370 NLRB 730, 731 (1992). To establish a violation of Section 8(a)(3) and (1) in cases where unlawful discipline and discharge is alleged, General Counsel has the burden of proving that the disciplinary action or discharge was motivated by employer antiunion animus.

The Supreme Court-approved standard for any case turning on employer motivation is found in *Wright Line*, 251 NLRB 1083 (1980). *See NLRB v. Transportation Mgmt. Corp.*, 462

U.S. 393 (1983). The framework established by the Board in *Wright Line* is a causation test. It requires proof by a preponderance of the evidence that an employee's union or other protected concerted activity was a motivating factor in the employer's decision to take an adverse employment action against the employee. The General Counsel has not—and cannot—show any causation here. Indeed, as the Board clarified in *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019), "the General Counsel does not invariably sustain his burden by producing . . . any evidence of the employer's animus or hostility toward union or other protected activity" but instead must produce evidence "sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Here, Starbucks on its own reversed Claypool's separation, reinstated her to her prior position, awarded her full backpay, and continues to employ her at the 75th Street store. This self-imposed course demonstrates the absence of animus or hostility toward Claypool and any protected activity in which she may have participated.

This is particularly so where, as outlined above, Starbucks has maintained a consistent practice of enforcing its COVID-related policies throughout the pandemic, even firing store managers who remain inside a store while exhibiting symptoms of COVID-19. (Resp. Ex. 17). Claypool, as a two-year employee, was aware of the COVID-related policies. Claypool was also aware of the store's opening procedures, including the process for obtaining permission to keep the store open with only one partner present. Yet, contrary to those procedures, she sought to take advantage of her new manager's inexperience with the policy to seek an unprecedented exception so she could remain in the store despite her symptoms. Inexplicably, she pointed to a new app as being responsible for her confusion, then admitted that the new app did not go into effect until almost two weeks after the events in issue took place.

Demonstrating an absence of animus, Starbucks gave Claypool the benefit of the doubt and reinstated her with full backpay. General Counsel's attempt to find a violation of the Act in this instance when the Company acted in good faith and reinstated the employee with full backpay does not fulfill any purpose of the Act. For these reasons, Starbucks has shown that it did not violate 8(a)(3) or 8(a)(1) of the Act when it lawfully separated, then lawfully reinstated Claypool, and this allegation should be dismissed in its entirety.

20. General Counsel Failed to Show Starbucks Unlawfully Terminated Michael Vestigo.

In Paragraph 34 of the Complaint, General Counsel alleged that on or about April 1, Starbucks "discharged Michael Vestigo" because "the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." (Third Consolidated Compl. ¶ 34(a)-(b)). The credible record evidence shows that Starbucks lawfully terminated Vestigo.

In a recent landmark decision, the Board abolished its various setting-specific tests, including *Atlantic Steel* and others, for analyzing when an employee's abusive conduct loses the protection of the Act. *General Motors, LLC*, 369 NLRB No. 127 (2020). The Board held "going forward, these cases shall be analyzed under the Board's familiar *Wright Line* standard," and "[w]e overrule all pertinent cases to the extent they are inconsistent with this holding." *Id.* at slip op. 2. Thus:

> As in any *Wright Line* case, the General Counsel must make an initial showing that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. If the General Counsel has made his initial case, the burden of persuasion shifts to the employer to prove it would have taken the same action even in the absence of the Section 7 activity.

Id.

This familiar framework established in *Wright Line* is a causation test. It requires proof by a preponderance of the evidence that an employee's union or other protected concerted activity was a motivating factor in the employer's decision to take an adverse employment action against the employee. That proof is utterly absent here. Merely showing Starbucks was aware of a partner's Union activities is not enough. There is no direct evidence of animus connected to the Company's discharge of Vestigo for telling his co-workers that he was going to physically assault Jenkins, and none of the typical indicia to which the Board looks to infer animus are present—i.e., there is no "showing of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behaviors for which the employee was allegedly fired" or "disparate treatment of the discharged employee." *Medic One, Inc.*, 331 NLRB 464, 475 (2000). While General Counsel is arguing that for the Company to take three weeks to investigate a serious, terminable workplace violence offense is too long and, therefore, the explanation for the discharge must be pretextual, that argument is insupportable here. Starbucks takes alleged threats of workplace violence extremely seriously but only separates the partner alleged to have issued the threat after its investigation is complete. The record here establishes the Company conducted a thorough investigation and, consistent with practice, Jenkins refrained from appearing at the store, so she had no contact with Vestigo while the investigation was underway. The investigation confirmed Vestigo had voiced the threat Seymour had overheard. As a result, after consulting Kimberly Harris, a partner within Starbucks' Partner Resources team who took the lead with the investigation, Jenkins concluded there was a basis for discharging Vestigo and she did so. Furthermore, unlike Doran and Claypool, Vestigo did not avail himself of the Company's internal processes for reviewing separation decisions. At the very least, his failure to

contest his separation suggests he knew full well he had conducted himself unacceptably and he no longer should work at a corporate Starbucks store.

There should not, and cannot, be a concern Starbucks did not suspend Vestigo while the investigation was underway. As noted above, to ensure against a threat maturing into something more, the practice is that the subject of the threat remains isolated from the person who allegedly voiced the threat. When, as here, a District Manager was the target of the alleged threat, she can ensure she does not appear at the site where the partner who allegedly voiced the threat works. And, respectfully, it is not for the Board to second guess the Company's practice of not suspending the partner alleged to have voiced the threat during the pendency of the investigation. In essence, the Company presumes innocence until the investigation is completed: all employees are partners deserving that benefit of the doubt. This case does not present the situation where there had already been workplace violence. This is not to minimize the importance of addressing threats of violence that have been voiced. But the Company handles such matters as has been described and there is no basis for anyone to infer anything from the fact that the Company does not suspend pending investigation in instances such as this on the record that has been presented here. (Tr. 1309, 1549, 1586-87).

Under prior case law, like *Atlantic Steel* and other setting-specific tests, causation had been largely presumed. In overruling those cases, the Board criticized the numerous inconsistencies created by those tests. *Id.* at slip op. 7. The Board further held:

> We do not read the Act to empower the Board to referee what abusive conduct is severe enough for an employer to lawfully discipline. Our duty is to protect employees from interference in the exercise of their Section 7 rights. Abusive speech and conduct (e.g., profane ad hominem attack or racial slur) is not protected by the Act and is differentiable from speech or conduct that is protected by Section 7 (e.g., articulating a concerted grievance or patrolling a picket line). Accordingly, if the General Counsel fails to show that protected speech or conduct was a

> motivating factor in an employer's decision to impose discipline, or if the General Counsel makes that showing but the employer shows that it would have issued the same discipline for the unprotected, abusive speech or conduct even in the absence of the Section 7 activity, the employer appears to us to be well within its rights reserved by Congress.

Id. Thus, in the absence of specific proof of causation, the General Counsel's case must fail.

Moreover, even if General Counsel could overcome its heavy burden here, Starbucks has shown that it would have issued the same discipline absent any alleged protected activities. Starbucks is committed to protecting its partners from workplace violence and maintains a Workplace Violence policy prohibiting statements or behaviors reasonably perceived as intimidating, frightening, threatening, or generating concern for personal safety. The policy also prohibits threatening or violent words delivered in person or remotely. Vestigo's statements clearly violated this policy. Starbucks conducted a thorough investigation into the alleged threats Vestigo made. And, after finding the allegations substantiated, Starbucks lawfully terminated Vestigo. Starbucks has a right to maintain a safe environment for all its partners and customers and will not tolerate personal threats of violence against any of its partners.

Finally, even under the prior shifting and inconsistent case law, the Board repeatedly drew a distinction between merely profane workplace conversations and outright threats of personal violence, holding the latter categorically unprotected by the Act. *See, e.g.*, *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), *enfd.* 652 F.3d 22 (D.C. Cir. 2011) (citing *Prescott Indus. Prods. Co.* 205 NLRB 51, 51-52 (1973)); *see also Fresenius USA Mfg.*, 358 NLRB 1261, 1266-67 (2012); *Beverly Health & Rehabilitation Servs*., 346 NLRB 1319, 1322-23 (2006). Accordingly, even pre-*General Motors*, the Board would have upheld Vestigo's termination because it did not just involve profane language but, rather, concerned a specific, targeted threat

of violence against an identified coworker. For these reasons, Starbucks has shown it did not violate 8(a)(3) or 8(a)(1) of the Act when it lawfully separated Vestigo.

21. General Counsel Failed to Show Starbucks Unlawfully Terminated Maddie Doran.

In Paragraph 35 of the Complaint, General Counsel alleged on or about April 5, Starbucks "discharged Maddie Doran" because "the named employee of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." (Third Consolidated Compl. ¶ 35(a)-(b)). The credible record evidence shows Starbucks lawfully discharged Doran.

As discussed above, the Supreme Court-approved standard for any case turning on employer motivation is found in *Wright Line*, 251 NLRB 1083 (1980). *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). The framework established by the Board in *Wright Line* is a causation test. It requires proof by a preponderance of the evidence that an employee's union or other protected concerted activity was a motivating factor in the employer's decision to take an adverse employment action against the employee. General Counsel has not—and cannot—show any causation here. Moreover, as the Board clarified in *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019), "the General Counsel does not invariably sustain his burden by producing . . . any evidence of the employer's animus or hostility toward union or other protected activity" but instead must produce evidence "sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee."

Here, the Company lawfully discharged Doran for failing to secure the store after she had just received a Final Written Warning alerting her to multiple cash variances and negligent cash handling issues in connection with her closing of the store. The infractions and policy violations

at issue were serious and could not be ignored or left unremedied. Moreover, Starbucks has separated other partners in its non-petitioned stores under nearly identical circumstances, including the specific instance, as here, where a partner on a Final Written Warning had failed to lock the store at close. Jenkins investigated both the Final Written Warning and the separation thoroughly, relying upon input from the Partner Resources Department. For the above reasons, General Counsel cannot show—and has not shown—that Starbucks acted out of any animus or hostility towards Doran based upon her alleged protected activities.

For all these reasons, Starbucks has shown it did not violate 8(a)(3) or 8(a)(1) of the Act when it separated Maddie Doran.

22. General Counsel Failed to Show Starbucks Constructively Discharged Hannah McCown.

In Paragraph 36 of the Complaint, General Counsel alleged that on or about April 12 Starbucks "caused the termination of its employee Hannah McCown." (Third Consolidated Compl. ¶ 36(a)-(b)). The credible record evidence showed no constructive discharge occurred.

A constructive discharge exists when an employee quits because the employer has deliberately made working conditions unbearable. *See Vill. Red Restaurant Corp. d/b/a Waverly Restaurant*, 366 NLRB No. 42 (2018). General Counsel must prove two elements to establish a constructive discharge in violation of Section 8(a)(3) of the Act: (1) "the burdens imposed on the employee must cause, and be intended to cause, a change in [the employee's] working conditions so difficult or unpleasant as to force [the employee] to resign" and (2) "those burdens were imposed because of the employee's union activities" *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976); *see, e.g., Yellow Ambulance Serv.*, 342 NLRB 804, 807 (2004); *Intercon I (Zercom)*, 333 NLRB 223, 223 n. 3 (2001).

General Counsel has failed to prove either element here. First, no one imposed any burdens on Hannah McCown. Ostensibly the alleged "burden" here comes from McCown's unsubstantiated claim Jenkins bullied her and McCown "wondering if [she] will be fired". (GC Ex. 17). Apart from her statements in the resignation text, McCown did not make any allegations about Jenkins bullying her. Her vague, unsubstantiated fears of being discharged are not the kind of "onerous" working conditions upon which successful constructive discharge cases are built. *See, e.g.*, *Pioneer Recycling Corp.*, 323 NLRB No. 107 (1997) (finding constructive discharge where the employer threatened to kill the employee and the employee's family, locked the employee in a garbage truck for two to three hours, shot at and hit the employee three times with pellet gun, and promised the employee benefits if the employee withdrew his grievance). Second, McCown quit long before she sent her voluntary resignation text. In early February, McCown interviewed for a full-time job at Farmers Insurance, which paid substantially more money and allowed her to work despite her extremely limited availability. After receiving the Farmers job offer, McCown informed Starbucks she could only work on weekends or during the week between 6:00 p.m. and 9:00 p.m. Rather than separate McCown because of her extremely limited availability, Starbucks allowed her to remain employed as a barista because her newly limited hours did not meet the minimum requirements for a shift supervisor position. Soon after, McCown reduced her availability even further, limiting her availability to only weekdays between 6:00 and 9:00 p.m. McCown then quit. On these facts, there can be no showing of causation between her alleged protected activities and the circumstances surrounding her separation from Starbucks: her protected activities had NOTHING to do with her separation. She made decisions about work and how to utilize her time best and in doing so limited her availability so she could no longer serve as

a shift supervisor. That alone was why she resigned and nothing about the circumstances leading to her resignation supports the claim that Starbucks constructively discharged her.

There are no facts here that even give rise to support for any constructive discharge claim. In *White-Evans Serv. Co., Inc.*, the Board held an employer did not violate the Act when an employee quit because he had the "impression" the employer intended to institute unilateral changes in working conditions. 285 NLRB 81, 82 (1987). The Board found that no constructive discharge had occurred because at the time of quitting, the employee was not confronted with the dilemma of either quitting or forgoing union representation. Rather, the employee quit because the employee had already accepted employment with another company at the time. *Id.* The same situation occurred here.

McCown got a new job and quit. No one forced her to resign, nor did anyone—other than McCown herself by extremely narrowing her availability—change McCown's working conditions to make work so onerous as to force her to resign. Further, her decision to resign because she believed that future discipline might be imposed against her is not a proper basis for a constructive discharge claim. *Id.*; *see also Gerig's Dump Trucking*, 320 NLRB 1017, 1023-24 (1996); *Aero Industries*, 314 NLRB 741, 742-743 (1994); *Groves Truck & Trailer*, 281 NLRB 1194, 1195-96 (1986); *cf. Wackenhut Corp.*, 348 NLRB No. 30 (2006). For these reasons, the allegation that McCown was constructively discharged must be dismissed in its entirety.

23. General Counsel Failed to Show Starbucks Unlawfully Refused to Recognize or Bargain with the Union.

In Paragraphs 37 and 40 of the Complaint, General Counsel alleged that "[a]t all times since about January 31, 2022," Starbucks "has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the Unit" and has "been failing and refusing to

bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act." (Third Consolidated Compl. ¶ 37(i), 40). Several uncontradicted facts plainly disprove this allegation.

First, contrary to the representations in the Complaint, the uncontradicted evidence shows that no one, including McCown, requested recognition on January 31. Nor is there any record evidence of any email allegedly sent to Starbucks demanding recognition on January 31.

Second, the petition itself shows that no demand for recognition had been made prior to the filing of the petition. (GC Ex. 36). The RC Petition itself did not indicate that the Union had made any initial request for recognition (Question 7a). (GC Ex. 36). The absence of any marking in section 7, which asks whether a request for recognition has been made, speaks volumes.

Third, Starbucks raised and properly preserved its issues with the proposed single store unit specified in the initial RC petition. In Starbucks' timely filed Statement of Position, dated February 15, 2022, the Company maintained the only appropriate unit was one consisting of all baristas and shift supervisors working in the stores within District 1063. (Resp. Ex. 82). As of that date, then, any demand for recognition of the Union as collective bargaining representative for the store would have been legally inconsequential since Starbucks had not yet acknowledged even the possibility that a single store unit was possible.

Fourth, on February 24, in Case 14-RC-289926, Starbucks executed its first Election Agreement ***with the Union***, obviating the need for a hearing and moving the parties expeditiously to an election. (Joint Ex. 1). The next day, on February 25, Regional Director Wilkes approved the Election Agreement. (Joint Ex. 1). Yet, on March 3, less than one week later, the Union reneged on the Election Agreement by instead trying to demand recognition of a completely different unit description under the auspices of *Joy Silk*, a decision more than 100 years extinct, as a way of

circumventing the Board conducting an election altogether. When employer representatives at the meeting did not agree to accept the petition of signatures that was purportedly a demand for recognition, McCown emailed it to them. The Union immediately filed a refusal to bargain charge, all within a week of Starbucks, in this very case, entering into the first election agreement nationally as a historic good faith step toward expediting representation elections at its stores.

With respect to the claim Starbucks unlawfully refused to recognize the Union based upon a petition allegedly signed by a majority of partners from the store, GC Memorandum 21-04 (August 12, 2021) recognizes that *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), is not the law. That is, employers may (for any reason or no reason at all) lawfully insist that a union prove its majority status by winning a Board-supervised secret ballot election. Indeed, in *Gissel* the Board announced during oral argument that it had "virtually abandoned" the *Joy Silk* doctrine, which the Supreme Court fully and finally buried in *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974). For nearly fifty years, Board members and General Counsel appointed by Presidents from both political parties have rightly allowed *Joy Silk* to rest in peace. Plainly, then, a bargaining order would be inappropriate under the circumstances here even if *Joy Silk* is exhumed and resurrected in the future.

General Counsel seeks to prove Starbucks violated Section 8(a)(5) of the Act when store partners allegedly attempted to present a document containing their signatures to Jenkins and Bellis at the March 3 voluntary meeting. In doing so, General Counsel appears to rely upon *Joy Silk*, which held "an employer may in good faith insist on a Board election" for proof of a union's majority status "but that it unlawfully refuses to bargain if its insistence on such an election is motivated, not by any bona fide doubt as to the union's majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union."

General Counsel leans on a broken reed. In addition to being widely discredited as a matter of law and policy, the *Joy Silk* standard is unworkable because the burden of proof General Counsel must meet to obtain a *Joy Silk* bargaining order will be (at best) extremely difficult to meet and will, therefore, routinely spawn litigation of a nature that is sure to create lengthy delays in the resolution of questions concerning representation. Moreover, the Union would not prevail here even if *Joy Silk* was the law. We first address the inapplicability of *Joy Silk* to the instant case and, second, explain why *Joy Silk* has been abandoned and should not be revived.

To illustrate the incongruity between *Joy Silk* and this case, it is important to start with the facts of the former, which are materially different from those here. Briefly, in a phone call with the employer on September 24, 1948, the union stated it had a card majority of production and maintenance employees and asked the employer to recognize it as the unit bargaining representative. 85 NLRB 1263 at 1264. The union offered to have a neutral party crosscheck the cards against the employer's payroll. *Id.* at 1275. The employer insisted that the union prove its majority status in a Board-conducted election. *Id.*

The Board found, based on the "unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct," that the employer's insistence upon an election was mere artifice and that "the real reason" the employer rejected the union's request for recognition was not to clarify whether the union had majority status but, rather, to "gain time within which to undermine the Union's support" through coercive unfair labor practices. *Id.* at 1264-65.

On appeal, the D.C. Circuit Court of Appeals held that when refusal to recognize a union "is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in section 8(a)(5) of

the Act." *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 741 (D.C. Cir. 1950). Based upon "the entire record," the court inferred from the employer's commencement of unfair labor practices only five days after the consent election had been agreed upon and only eighteen days after refusing recognition that "it is a reasonable conclusion that the employer did not suddenly suffer a change of heart" in those few days such that the employer could be seen as acting in good faith when it refused recognition given its evident bad faith mere days later. *Id.* at 741-42. "Petitioner has transgressed the bounds of permissible conduct to a sufficient extent to permit the Board to conclude that its refusal to bargain was as ill-intentioned as its other actions." *Id.*

The instant case is in a different posture than *Joy Silk*. As discussed above, *Joy Silk* addressed the issue of a pre-petition refusal to grant card check recognition under circumstances where the appropriateness of the unit sought was not in dispute. Here the Union filed its 75th Street store petition in Case 14-RC-289926 on February 2, at a time the Union knew Starbucks was disputing the appropriateness of single store units uniformly across the country. In Section 7 of the petition, the Union did not claim to have made a pre-petition demand for recognition (let alone that Starbucks had declined such a demand). Section 7 of the petition is empty because, unlike in *Joy Silk*, the Union here did not demand recognition prior to filing the petition or offer a neutral process for determining whether the showing of interest it purported to have reflected the wishes of an uncoerced majority of partners in an appropriate unit. Accordingly, *Joy Silk* is inapt since Starbucks did not refuse a pre-petition demand for recognition.

The Union's claim is laid bare by post-petition events. For example, on February 3, after the petition was filed, Starbucks received by email a typewritten letter purportedly from the Union and/or a majority of store partners as agents for the Union. The letter did <u>not</u>: (1) include any handwritten signatures; (2) claim the Union had majority support; (3) describe any bargaining unit;

or (4) include a demand for recognition. Rather, it asked Starbucks to sign "Fair Election Principles." This is further confirmation the Union did not then have, or claim to have, majority support and that it did not make the type of pre-petition demand for recognition that *Joy Silk* would require if it was the law. Further, pursuant to the Election Agreement, ballots were supposed to have been mailed on March 16 (an issue at the heart of the objections case) and counted on April 8. Unlike in *Joy Silk*, the Union here did not withdraw its petition and has continued not to do so.

Joy Silk does not address recognition demands that are post-petition and follow execution of stipulated election agreements. But if it did, the Union would lose again. As long as the petition remained pending, Starbucks was entitled to insist upon retaining the benefit of the bargain it struck in the Election Agreement—i.e., a secret ballot election to determine whether the Union actually had the majority support it belatedly claimed to have. Election agreements are binding on the parties. *See T & L Leasing*, 318 NLRB 324, 325 (1995) (election set aside because Regional Director breached terms of the election agreement). While the election agreement remained in effect (and continues to remain in effect), there is no basis for the Union or General Counsel to maintain that Starbucks has a duty to recognize and bargain with the Union under *Joy Silk*.

Then, of course, there are the alleged events of March 3. General Counsel alleges the 75th Street store partners attempted to present written evidence of majority support to management at the March 3 meeting, "while verbally explaining the contents of the document in question." While the Company takes issue with that allegation itself, General Counsel overlooks the fatal flaws in the 2-page demand for recognition letter Hannah McCown attached to her email to Drake Bellis and Sara Jenkins on March 7 with a note that read as follows: "Here is our store's petition that proves our store's majority status of partners part of the union." First, the demand for single store recognition on page 1 is not a demand for recognition of an appropriate unit. Second, while page

2 includes the purported signatures of some store partners, those signatures (unlike the signatures on the first page) do not appear under any statement of interest in being represented by the Union and, therefore, do not qualify as a valid showing of interest. In other words, Starbucks had and retains a good faith belief that any authentic signatures the Union claims to have had on March 3 or 7 do not represent the actual wishes of an uncoerced majority of partners in an appropriate unit.

As the circuit court recognized in *Joy Silk*, "Neither the Board nor the courts can read the minds of men." *Joy Silk Mills*, 185 F.2d at 742. Litigation over the employer's subjective motivation for refusing to grant card-check recognition cannot yield anything other than waste and caprice. In the instant case, the Union seeks to litigate Starbucks' subjective motivation in refusing to grant card-check recognition without any objective evidence of bad faith, in effect asking the Board to speculate on Starbucks' thoughts. Even if *Joy Silk* were still good law—and it is not—the *Joy Silk* inference of bad faith is a far cry from unsubstantiated, ungrounded conjecture that the Union here invites.

Because there has been no claim of majority status in an appropriate unit and no bona fide demand for recognition, there can be no violation of Section 8(a)(5) here under *Joy Silk*. That is, there can be no proof that Starbucks insisted upon a secret ballot election because of some desire to gain time to take illegal actions to dissipate the Union's majority status. Without such proof, the Union is precluded from testing Starbuck's motivation under the *Joy Silk* doctrine, if it is ever revived.

It should go without saying that the *Joy Silk* doctrine should not be revived. The appropriate starting point for this case is controlling law—*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974). GC Memo 21-04 tacitly recognizes *Joy Silk* is not the law and has not been the standard governing the duty to

bargain with a union claims majority status for more than fifty years. Notably, before *Gissel* and *Linden Lumber* were decided, the Board had already substantially clarified *Joy Silk* in *Aaron Brothers*, 158 NLRB 1077 (1966). There the Board explained that the purpose of the *Joy Silk* rule is to further "the Board's objective of utilizing the most reliable means available to ascertain the true desires of employees with respect to the selection of a collective-bargaining representative. Where an employer has engaged in unfair labor practices, the results of a Board-conducted election are a less reliable indication of the true desires of employees than authorization cards, whereas, in a situation free of such unlawful interference, the converse is true." *Id.* at 1080, n. 10. Because an uncoerced election is the most reliable indication of employees' true desires, the Board held an employer's insistence upon an election is generally proper and General Counsel bears the burden to produce affirmative evidence that the employer's "insistence upon an election to establish the Union's majority" is motivated by bad faith. *Id.* at 1080.

The Board held:

> Absent an affirmative showing of bad faith, an employer, presented with a majority card showing and a bargaining request, will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority.

Id. at 1078. The Board dismissed the union's complaint in *Aaron Brothers* because General Counsel failed to come forward with evidence of any "contemporaneous misconduct" or "other affirmative evidence from which an inference of bad faith might be drawn." *Id.* at 1080. Here, the Union has also failed to articulate any action Starbucks has taken to dissipate the Union's purported majority status. Indeed, since March 3 there have been no group meetings related to union topics, there has been minimal contact with partners despite Starbucks' free speech right to communicate its views to its partners, and the partners went on strike without any negative repercussions.

The Company's "First Amendment right is embodied in Section(s) 8(c) [of the Act], which allows the employer to express 'any views, argument, or opinion' in any media form without committing an unfair labor practice provided that 'such expression contains no threat of reprisal or force or promise of benefit.'" *NLRB v. Pratt Whitney Air Craft Div., United Technologies Corp.*, 789 F.2d 121, 134 (2d Cir. 1986) (footnotes omitted). "Granting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions." *Id.*

In *Gissel*, at the Board's request, the Supreme Court held that an employer's refusal to recognize a union having majority support would only be unlawful where the employer's conduct made the holding of a fair election impossible. *Id.* at 589. After *Gissel*, an employer's good faith doubt, or lack thereof, is irrelevant in determining if an employer is obligated to recognize a union based on a card majority. *Linden Lumber*, which definitively held that a union that is refused recognition based on authorization cards has the burden of invoking the Board's election procedure, eviscerated whatever shred of *Joy Silk* might have remained after *Gissel*.

The D.C. Circuit Court of Appeals aptly described the reasons for *Joy Silk*'s demise in *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980):

> [The *Joy Silk*] standard embroiled both the Board and the courts in countless disputes over an employer's intent and state of mind when in fact, the employer's state of mind should be irrelevant. If the union represented a majority there should be bargaining; if it did not, there should not be bargaining. Therefore, it made far more sense to rely on an efficient and speedy method of ascertaining actual employee wishes than to permit lengthy and ambiguous disputes over employer intent and good faith. The approach was gradually eroded; "virtually abandoned" by the time [*Gissel*] was decided; and finally laid to rest with the decision in *Linden Lumber* . . .

Id. at 43. Because the holdings of *Gissel* and *Linden Lumber* make statutory, constitutional, and practical sense, the Board and the courts have steadfastly refused "to reenter the 'good-faith' thicket of *Joy Silk*." *Jerr-Dan Corp.*, 237 NLRB 302, 310 (1978) (internal citation omitted).

It necessarily follows that under controlling Board and Supreme Court law, Starbucks was not obligated to accept a signed petition or card check as proof of the Union's majority status. Starbucks had and has the right to insist upon continuing the election process that was already underway at the time the alleged demand for recognition was made. And a bargaining order may not issue unless Starbucks is found to have committed unfair labor practices that interfere with the process and preclude the holding of a fair election, which Starbucks clearly has not done.

Finally, for those reasons (among others) fully set forth by the Board in *Dana Corporation*, 351 NLRB 434 (2007)—which includes an entire section on "The Greater Reliability of Board Elections"—Starbucks may not be accused of having or having had a "bad faith" motivation for denying recognition based upon the letter it received by email on March 7. In *Dana* (which was overruled but is now codified policy in the Board's voluntary recognition bar rule, *see* 29 CFR § 103.21), the Board reiterated its longstanding view (adopted by the courts) that secret ballot elections are superior to card checks and provide the most reliable basis for determining whether an uncoerced majority of employees want representation. The Board noted, for example, that "employees can and do change their minds about union representation" after hearing the type of robust debate the Act not only permits under Section 8(c) but encourages as matter of statutory policy. *Id.* at 442. In addition, "card signings are public actions, susceptible to group pressure exerted at the moment of choice" that may rise to the level of coercion prohibited by Section 8(b)(1)(A) of the Act. *Id.* at 438. Quoting the Seventh Circuit's decision in *NLRB v. Village IX, Inc.*, 723 F.2d 1360 (7th Cir. 1983), the Board in *Dana* further noted:

> Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election).

Id. at 439. Other concerns raised by the Board in *Dana* include the fact that "union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options" and employees may not actually understand the potential legal significance of what they are signing. *Id.* at 439. "Among the factors that undoubtedly tend to impede [employee free choice] is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice." *Id.* at 439, n.21 (quoting *Excelsior Underwear*, 156 NLRB 1236, 1240 (1966)).

The Union's reliance upon *Joy Silk* required submission of the charge to the Division of Advice pursuant to GC Memo 21-04. General Counsel was so eager to pursue this *Joy Silk* claim that General Counsel issued the instant Complaint with its new *Joy Silk* theory and set a hearing to begin less than two weeks after the Complaint issued, sacrificing Starbucks' due process rights in a misguided effort to exhume an unreliable, century old standard.

The Board and courts properly and correctly determined that the *Joy Silk* doctrine was unworkable, impractical, and contrary to the policies of the Act. Resurrecting a Board doctrine that was widely discredited and then ultimately abandoned decades ago would not only be bad policy and a bad look for the Board; at this point, it is doubtful whether *Joy Silk* may be revived Constitutionally without legislation or a valid rulemaking process. The Board has followed *Gissel* and *Linden Lumber* for almost five decades. These decisions are super-precedents that the Board must continue to follow absent the Supreme Court specifically and expressly reviving *Joy Silk.*

Joy Silk-style attempts to plumb of the depths of an employer's private motivations do not promote stability in labor relations. The Act provides for election proceedings to ensure employees may freely register their individual choices concerning representation and an employer may secure a determination of whether the union does in fact have majority status and is therefore the appropriate agent with which to bargain. "In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored." *Linden Lumber Div.*, 419 U.S. at 307. For these reasons, it is far more efficient, economical, and consistent with employee free choice for elections to remain the preferred method for resolving questions concerning representation instead of having them litigated in the context of an unfair labor practice trial.

a. There Was No Demand for Recognition on January 31st

In Paragraph 37(c) of the Complaint, General Counsel alleged that "[a]bout January 31, 2022, the Union, by email from employee Hannah McCown, requested that Respondent recognize the Union as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit." (Third Consol. Compl. ¶ 37(c)). General Counsel failed to establish such a demand was made.

General Counsel relies solely upon the testimony of McCown in support of the claim that a demand for recognition was made on January 31. The letter, entered in evidence as General Counsel Exhibit 5, contains no demand for recognition, no signatures, nor any claim of majority status. (Tr. 233; GC Ex. 5). Although McCown claimed the existence of an email to then CEO Kevin Johnson containing the January 31 letter, the record is devoid of any such evidence as General Counsel did not introduce any such email as an exhibit during its case. As explained at length above, because McCown's testimony was replete with self-serving inaccuracies and

demonstrably false statements, McCown's testimony should not be credited here. Additionally, the failure to disclose the existence of such a demand in the petition for a representation election for the 75th Street store on February 2 further disproves this claim. (GC Ex. 35).

Notably, General Counsel cannot rely on the electronic authorization cards as evidence of the employer's knowledge of any purported majority status as there is no evidence such cards were ever presented to the Company. Moreover, several of the cards are facially invalid. According to General Counsel Memorandum 15-08, an *electronic* authorization card must contain the following elements to be valid: (1) the signer's name; (2) the signer's email address or other known contact information (e.g., social media account); (3) the signer's telephone number; (4) the language to which the signer has agreed (e.g., that the signer wishes to be represented by the Union for purposes of collective bargaining); (5) the date the electronic signature was submitted; and (6) the name of the employer of the employee. *GC Memorandum 15-08* at 5.

Here, at least four of the electronic authorization cards (i.e., Kyle Stefanik, Carlee Stoermann, Kelsey Stoermann, and Delia Twaddell) were facially invalid as of the time of submission as they failed to include any telephone numbers for the signers. (GC Ex. 38). Additionally, Starbucks was unable to develop a complete record on whether the cards were obtained free from coercion as Judge Amchan sustained objections to its questions seeking information about what statements were made to the signers prior to obtaining their signature on the authorization cards for some, but not all, witnesses. (*Compare* Tr. 1058 *with* Tr. 1079). Further, where permitted, questions were improperly limited to statements such as instructions on how to complete the card, and Starbucks was not permitted to probe into whether, for example, the employee was falsely told majority status had already been achieved. (Tr. 1051, 1073-74, 1079-81). As such, Starbucks could not develop a complete record regarding whether cards were

improperly obtained through misrepresentations and/or coercion. *See, e.g., NLRB v. The Rohtstein & Co.*, 266 F.2d 407, 410 (1st Cir. 1959) ("It seems clear that there can be no refusal to bargain in violation of Section 8(a)(5) on the part of an employer if the purported representative of his employees was not freely designated as such by the majority of his employees in the appropriate bargaining unit.").

Cumberland Shoe Corp., 144 NLRB 1268 (1963), established that an unambiguous card is valid unless and until it is rendered invalid through solicitation misrepresenting the sole purpose of the card. A card may be ambiguous, and thus facially invalid, through either the words on the card or through the manner in which the card is presented to the signee. The Board has found that a card is rendered ambiguous through the words on the card when it both authorizes union representation and states that "[t]he purpose of signing the card is to have a Board-conducted election" *Nissan Research & Development*, 296 NLRB 598, 599 (1989) (internal quotation marks omitted). The Board has clarified that cards which seek both majority status and representation must, of necessity, express the intent to be represented by a particular labor organization. *Levi Strauss & Co.*, 172 NLRB 732, 733 (1968). Thus, "the fact that employees are told in the course of solicitation that an election is contemplated, or that a purpose of the card is to make an election possible, provides . . . insufficient basis in itself for vitiating unambiguously worded authorization cards on the theory of misrepresentation." *Id.* Absent evidence of such misrepresentation, inquiry into the subjective motives or understanding of the signatory to determine his or her intentions toward usage of the card is irrelevant. *See Sunrise Healthcare Corp.*, 320 NLRB 510, 524 (1995). As the Supreme Court clarified, summarizing and expanding upon *Cumberland Shoe* and *Levi Strauss*:

> [E]mployees should be bound by the clear language of what they sign unless that

> language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election . . . in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the Cumberland rule. We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of 8(a)(1). We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry.

Gissel, 395 U.S. at 606-60. The Supreme Court in *Gissel* approved the Board's *Cumberland Shoe* doctrine, finding that employees will generally be held responsible for their acts and therefore bound by the clear, unambiguous language of the card they sign. 395 U.S. at 606. An exception exists, however, where that language is "deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above the signature." *Id.* Demonstration of a qualifying misrepresentation must be established "on the basis of what the employees were told, not on the basis of their subjective state of mind when they signed the cards." *Aero Corp.*, 149 NLRB 1283, 1290 (1964).

Although an employer's burden to prove such a "cancellation" is a steep one, denying Starbucks the opportunity to fully elicit appropriate record testimony on the issues prejudiced Starbucks in its defense of this case. That is, even where it is undisputed that an employee did not read the card's language, he will be bound by it unless the employer offers clear and convincing evidence that the card solicitor expressly indicated that the card "would be used only for a different, more limited, purpose than that stated on the card." *Photo Drive Up*, 267 NLRB 329, 364 (1983) (citing *Gissel*). Thus, it is imperative the employer have the opportunity to illicit testimony on whether a different purpose was presented by the solicitor at the time the card was signed. *Compare*

Warehouse Groceries Mgmt., Inc., 254 NLRB 252, 254 (1981) (finding valid card solicited on representation that "if a certain number of people signed the cards, the Union 'would come in and investigate and . . . look around.'") *with Sambo's Restaurant*, 269 NLRB 1187, 1188 (1984) (finding invalid cards solicited on representation that "the only purpose of signing the card was to have an election"). Here, Starbucks was prejudicially denied the opportunity to determine such issues by the inappropriate limiting of its questioning of the witnesses.

b. There Was No Valid Demand for Recognition on March 3rd or March 7th.

In Paragraph 37(d) of the Complaint, General Counsel alleged that "[a]bout March 3, 2022, the Union, by employee Hannah McCown, prior to and after a meeting held at the Courtyard by Marriott located at 11001 Woodson Street, Overland Park, Kansas, presented Respondent with a petition signed by employees indicating that a majority of employees had designated the Union as their collective bargaining representative and requesting that the Respondent recognize the Union as the exclusive collective-bargaining representative of the Unit and bargain collective with the Union as the exclusive collective-bargaining representative of the Unit." (Third Consol. Compl. ¶ 37(d)). Additionally, in Paragraph 37(e) of the Complaint, General Counsel alleged that "[a]bout March 7, 2022, the Union, by employee Hannah McCown, emailed the petition referred to above in paragraph 37(d) to Respondent." (Third Consol. Compl. ¶ 37(e)). Starbucks denies either of the above referenced situations constituted a legitimate demand for recognition. Thus, these allegations should be dismissed for this additional reason.

The irrefutable record evidence shows no legitimate demand for recognition was presented. First, the alleged Request for Recognition, entered in evidence as General Counsel Exhibit 8, is facially invalid because it contains no return address and contains no proposed meeting dates or

places for any proposed bargaining session. *See Sheboygan Sausage Co.*, 156 NLRB 1490, 1500 (1966) (rejecting a purported demand for recognition because it omitted any return address and failed to propose any meeting date or place). The failure to include any "mechanics requisite for the actual initiation of concrete bargaining sessions" takes on "added significance" when made alongside a Union's "contemporaneous action to obtain an election." *Id.* Here, the Union's actions in stipulating to an election agreement plainly contradict any efforts to demand bargaining. As such, evidence of the Union's alleged demand for recognition is contradictory at best, and as such cannot constitute an unequivocal demand for recognition as a matter of law. *Id.*

Second, the petition is addressed to Kevin Johnson, then CEO of Starbucks. There is no record evidence of the petition ever being presented to Kevin Johnson. There is no evidence of Johnson attending the March 3 meeting, and no evidence of the email being sent to Johnson after the meeting. In fact, there is no evidence of any emails to Johnson in this proceeding.

B. Country Club Plaza Store Allegations

1. General Counsel Failed to Show Starbucks Unlawfully Threatened to Withhold Benefits.

In Paragraph 17 of the Complaint, General Counsel alleged that on February 2 Starbucks, through Ellie Grose, "threatened employees with a loss of future wage increases or benefits if employees selected the Union as their bargaining representative." (Third Consolidated Compl. ¶ 17). However, General Counsel failed to establish any such statements were made.

In analyzing whether statements made during a campaign violate 8(a)(1) of the Act, "[t]he test is whether the employer engaged in conduct which, it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). Violations do not turn on the speaker's motive or whether the employee relied

on the statement, but instead whether the statement would interfere with a reasonable employee's free exercise of Section 7 rights under the Act. *See, e.g.*, *Gissel*, 395 U.S. at 618; *Almet, Inc.*, 305 NLRB 626 (1991).

Here, Grose credibly testified she acknowledged the pending petition at the store by explaining that through the collective bargaining process, wages could go up, could go down, or could stay the same. (Tr. 1379). Additionally, Grose's statements regarding the collective bargaining process were corroborated by educational materials posted in the back of the store throughout the campaign, stating *inter alia*: "Workers United cannot guarantee you get anything specific in bargaining. In fact, no one knows what will happen in bargaining. You *could* get more, you *could* get less, or things *could* stay the same." (Tr. 1400; Resp. Ex. 75).

Numerous decisions have held that factual statements, such as the statement Grose made, a do not violate the Act. *See Wild Oats Mkts., Inc.*, 344 NLRB 717 (2005) (statement "in collective bargaining you could lose what you have now" was not unlawful because it explained negative outcomes in the collective bargaining process); *Jordan Marsh Stores Corp.*, 317 NLRB 460 (1995) (statement bargaining is a "race" is not unlawful). As such, the allegation should be dismissed in its entirety.

2. General Counsel Failed to Show Schmidt Threatened to Enforce the Dress Code Policy More Strictly in Response to Employees' Union Activities on February 22nd.

In Paragraph 16 of the Complaint, General Counsel alleged that Starbucks, through Eric Schmidt, "threatened employees with more strict enforcement of the dress code because they engaged in union activity" on February 22. (Third. Consolidated Compl. ¶ 16). The credible record evidence proves otherwise.

In analyzing whether statements made during a campaign violate 8(a)(1) of the Act, "[t]he

test is whether the employer engaged in conduct which, it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). Violations do not turn on the speaker's motive or whether the employee relied on the statement, but instead whether the statement would interfere with a reasonable employee's free exercise of Section 7 rights under the Act. *See, e.g.*, *Gissel*, 395 U.S. at 618; *Almet, Inc.*, 305 NLRB 626 (1991).

Unlawful threats to enforce rules more strictly must include words or gestures linking the threatened enforcement to the employees' protected activities. *See, e.g.*, *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995) (employer violated Sec. 8(a)(1) by informing employees, while waving a proposed collective-bargaining agreement, that the shop would be run "strictly by union rules"); *DHL Express, Inc.*, 355 NLRB 1399, 1402-05 (2010) (upholding finding of 8(a)(1) where manager told employee if the union prevailed in the upcoming election, the manager would be less flexible with his tardiness policy).

In *Miller Industries Towing Equipment*, credible testimony established that a manager told employees "[w]e're pretty lenient now, but if this comes in, you know we'll all have to abide by rules, stricter rules pertaining to lunch and breaks." 324 NLRB 1074, 1084 (2004). The statement itself acknowledged the employer was currently lax in how it approached the rules, then threatened stricter enforcement "if [the Union] comes in." *Id.* Similarly, in *Treanor Moving & Storage Co.*, 311 NLRB 371, 375 (1993), the Board upheld a finding an employer had violated 8(a)(1) where a manager told employees it "used to let you guys get away with this kind of stuff" but "now you are union and you guys are playing your game and the company is going to have to play by their game." The statements were deemed unlawful threats because they contained words directly linked the threatened enforcement to the employees' union activities.

The evidence linking the threat to the employees' protected activities is crucial for distinguishing an unlawful threat from a lawful statement predicting the effects of unionization based upon objective facts. In *Olympic Supply Inc.*, the Board explained the distinction when it upheld the finding of an unfair labor practice during a decertification campaign based upon credible testimony that a manager had told two employees "he would cease being lenient and have to be stricter if the Union continued serving as the bargaining unit's labor representative." 359 NLRB 797, 800 (2013). The Board reasoned that the manager's comments violated 8(a)(1) of the Act because they neither predicted the effects of unionization (as the Union was already certified as the employees' representative) nor addressed objectively the consequences of unionization that were beyond the Company's control. *Id.* Because the parties were already obligated to follow contractual provisions laid out in their collective bargaining agreement, the manager's threat to more strictly enforce rules could not be justified as an objective prediction of unionization. *Id.*

The sole evidence General Counsel presented in support of this allegation came from one witness, Chris Fielder. (Tr. 974-75). Specifically, Fielder testified during the February 22 meeting at the Country Club Plaza store, Store Manager Eric Schmidt said, "the holiday season had been busy and stressful on all of us, and that things had not been enforced consistently or at all, and that we were going to be taking a refreshed look at the dress code and coming back to it in earnest." (Tr. 974). Fielder further claimed Schmidt said certain dress code violations that had been tolerated before and had been allowed would be required for all because he felt some people were abusing the privilege." (Tr. 974-75). Fielder said Schmidt then asked the partners to review the dress code and "should all be prepared to follow what it said." (Tr. 975).

In contrast, Schmidt testified regarding his discussion of the dress code at the February 22 meeting and described his statements as "a review and follow up on dress code." (Tr. 1395-96).

Schmidt maintained that he reviewed several common issues so they could further align on them, such as not wearing clothes within the designated color palette and not wearing jewelry such as watches, bracelets and rings, messy aprons, and name tags. (Tr. 1396).

Given these competing accounts, a credibility determination is necessary to determine whether Schmidt made any threatening remarks at the February 22 meeting. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the entire record. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003). Here, several factors favor crediting Schmidt's testimony over Fielder's testimony. Notably, General Counsel limited its questioning of the only other witness in attendance at the February 22 meeting, Adaline Wright, to specifically avoid asking her questions about what Schmidt said at the meeting. This fact alone weighs in favor of crediting Schmidt's testimony over Fiedler. Additionally, Schmidt credibly articulated his long history of dress code enforcement at the store and recalled with detail every other topic he discussed at the February 22 meeting. Overall, Schmidt appeared more credible than Fielder and, therefore, his testimony should be credited over that of Fielder with respect to whether Schmidt made any threatening statements at the meeting.

Even if, *arguendo*, the Judge chooses to credit Fielder over Schmidt regarding what Schmidt said at the February 22 meeting, General Counsel still failed to meet her burden of showing Starbucks violated the Act here since key evidence is absent from the record. Specifically, nothing in any of the testimony adduced from Fielder or any other witness indicates Schmidt made

any statements from which one could infer union animus or retaliatory motive. There is no evidence of Schmidt making any conditional statements relating to his enforcement of the dress code (e.g., *if* you cease your union support *then* we will not enforce the dress code as strictly). Nor is there any record evidence indicating that Schmidt threatened more strict enforcement of dress code in response to employees' union activities. In fact, all the evidence points to the opposite being true, namely, that Schmidt had a long-established practice of enforcing the dress code at his store and he continued to do so. Since there is no record evidence indicating Schmidt threatened to enforce the dress code more strictly because of partners' union activities, General Counsel failed to show Starbucks violated 8(a)(1) as alleged in Paragraph 16 of the Complaint, and that allegation must be dismissed in its entirety.

3. General Counsel Failed to Show Starbucks Enforced the Dress Code More Strictly at the Country Club Plaza Store in Response to Employees' Section 7 Activities.

In Paragraph 28 of the Complaint, General Counsel alleged that "[s]ince about February 22, 2022," Starbucks has "more strictly enforced its dress code at its Plaza Store . . . . because the employees . . . formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." (Third Consolidated Complaint ¶ 28(a)-(b)). However, there is no credible record evidence supporting this allegation.

An employer violates Sections 8(a)(3) and (1) of the Act when it more strictly enforces its work rules in response to employees' union activities. *See, e.g., Print Fulfillment Servs. LLC*, 361 NLRB 1243, 1245-46 (2014). In analyzing such claims, the Board applies its familiar *Wright Line* framework. *Wright Line*, 251 NLRB 1083 (1980), *enfd*. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). *Wright Line* is a causation test, requiring proof by a preponderance of the evidence showing an

employee's union or other protected, concerted activity was a motivating factor in the employer's stricter enforcement of its rules. General Counsel has not—and cannot—show any violation of the Act occurred here for several reasons.

First, there is no credible evidence showing that the Company more strictly enforced its rules after February 22. In fact, the record is replete with evidence to the contrary. Schmidt credibly testified regarding his longstanding practice of enforcing the dress code at the Plaza store, which was corroborated by a mountain of documentary evidence. (Tr. 1384-99; Resp. Ex. 71). Schmidt credibly testified he has never changed the way he enforces the dress code. (Tr. 1399). Indeed, the only evidence of Schmidt's enforcement of the dress code policy at the Plaza store via written discipline relates to the summer of 2021, prior to any union activities. (Tr. 1396-97). Schmidt did testify he issued written discipline for dress code violations at his previous stores in Wichita, Kansas, back in 2014. (Tr. 1397-98). However, other than those two incidents, there is no evidence of any written discipline at the Country Club Plaza store for dress code violations.

Instead, General Counsel seeks to rely solely upon alleged verbal coaching conversations as evidence of the store's stricter enforcement of dress code. Yet, here, General Counsel strategically limited its testimony regarding Schmidt's prior enforcement of the dress code to only one witness, Chris Fielder, a partner who had worked at the Country Club Plaza store for at most two months prior to the store's union activities. Undoubtedly General Counsel's reason for doing so was to prevent Addy Wright, a long-tenured shift supervisor, from testifying about her own experience enforcing the dress code at the Plaza. As Schmidt explained, he has always relied upon his shift supervisors and assistant store managers to hold others accountable to the dress code through verbal coaching conversations. (Tr. 1402). Schmidt relied primarily upon shift supervisors like Wright to enforce the dress code since he has only had an assistant store manager in the Plaza

store since December 2021. (Tr. 1402). Schmidt credibly testified having coached shift supervisors in the past for failing to hold others accountable for dress code violations since it is part of their duties and responsibilities to do so. (Tr. 1402). Schmidt then clarified he alone handles the issuance of any written discipline for dress code policy violations when they arise. (Tr. 1402).

Fielder made conclusory statements about noticing the Assistant Store Manager, Heather Neal, starting to enforce the dress code in mid-March, not in mid-February as alleged in the Complaint. (Tr. 976). But when pressed for specifics, Fielder could only identify one conversation between Neal, the ASM, and a barista named Dean Chavez when he wore canvas shoes, which Fielder admitted were not within dress code. (Tr. 968). The only other verbal coaching Fielder could recall took place on June 26, months after the filing of this Complaint, when Fielder claimed he wore a t-shirt he had never worn before and that he knew was not in dress code. (Tr. 976, 980-81). It appears, then, that General Counsel has gone to complaint over an alleged unfair labor practice for allegedly more strictly enforcing the dress code based upon one partner (Fielder) claiming ASM Neal verbally reprimanded another partner (Chavez) one time with respect to an infraction of the dress code Fielder concedes was violative. General Counsel also failed to adduce evidence tying enforcement of the dress code in this instance to union activity by Chavez. It is apparent that finding an unfair labor practice on such a flimsy record would effectively prohibit employers from enforcing any of their work rules during a union campaign. Starbucks submits that on this record General Counsel failed to meet its burden of proving Starbucks more strictly enforced its dress code policy at the Country Club Plaza store at all, let alone in response to union organizing there. General Counsel also failed to adduce any evidence of any statements made by Schmidt or Neal from which any retaliatory motive could be inferred. It follows that this allegation should be dismissed in its entirety.

4. General Counsel Failed to Show Assistant Store Manager Heather Neal Acted as a Statutory Agent Under Section 2(13) of the Act.

General Counsel failed to show ASM Heather Neal acted as a Section 2(13) agent under the Act in committing alleged unfair labor practices at the Country Club Plaza store. Notably, General Counsel presented no witness testimony regarding the job duties of an ASM. Instead, General Counsel seeks to rely solely upon a flyer allegedly posted in the store that Fielder photographed on February 21. (Tr. 963-64).

By seeking to impute the alleged conduct of the ASM at the Country Club Plaza store to Starbucks, Region 14 ignores the fact that it ordered the ASM included in the unit *sua sponte* as a job classification permitted to vote subject to challenge. *See Starbucks Corp.*, Case No. 14-RC-289930 at 50 (DDE, May 3, 2022). Specifically, in its Decision and Direction of Election, the Regional Director of Region 14 ordered:

> **OTHERS PERMITTED TO VOTE**: At this time, no decision has been made regarding whether employees classified as **Assistant Store Manager** are included in, or excluded from, the bargaining unit, and individuals in this classification may vote in the election but their ballots shall be challenged since their eligibility has not been determined. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

Id. By virtue of that Decision and Direction of Election, for the duration of the campaign Starbucks was unable to treat its ASM as a member of management. For this reason, none of Neal's comments or actions can be imputed to the Company in this case, especially in view of General Counsel's failure to elicit record evidence establishing that Neal acted as a member of management in connection with enforcement of the dress code during the election campaign.

It bears mention in this regard that Schmidt testified without contradiction that his practice was to rely heavily upon shift supervisors to enforce dress code policies. However, the record is barren regarding whether Neal, the ASM, did so during the campaign. It follows that General

Counsel did not meet her burden of establishing that Neal acted as a statutory agent with respect to the conduct in issue. *See, e.g.*, *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1336 (2004); *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). As a result, this allegation should be dismissed.

C. Lawrence Store Allegations

1. General Counsel Failed to Show Starbucks Unlawfully Interfered with, Restrained, or Coerced Employees in the Exercise of Their Section 7 Rights by Prohibiting Discussion of Unions.

In Paragraph 22 of the Complaint, General Counsel alleged that on April 29 Starbucks, through Wolf, "prohibited employees from talking about unions or union organizing while permitting employees to talk about other non-work-related subjects." (Third Consolidated Compl. ¶ 22). The uncontradicted record evidence shows such conduct did not occur.

Section 8(a)(1) of the Act provides it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *See Brighton Retail Inc.*, 354 NLRB 441, 447 (2009). While prohibiting employees from discussing the union would—if true—be a violation of Section 7 rights, no such conduct ever occurred in the Lawrence store. There is no record evidence whatsoever of management telling anyone they could not discuss the Union at the Lawrence store.

Instead, the uncontradicted record evidence establishes the existence and maintenance of a cup calling policy allowed partners to use their judgment in deciding whether they felt comfortable calling out a name on a cup and that this policy existed and was enforced both before and after organizing activities took place at the Lawrence store. (Tr. 1014-16, 1021-22; Resp. Ex. 10 at 6).

There is also no record evidence of any partner, under the cup calling policy, having had to grapple with whether to call out the name "union" or the name of a union and this policy actually having been put to the test or, for that matter, any partner having been told not to say the word "union" by virtue of the cup calling policy. It follows that on this record, General Counsel failed to establish that any unlawful restriction of Section 7 speech occurred at this store.

D. Affirmative Defenses

1. The Allegations Are Barred by Equitable Defenses of Waiver, Estoppel, and Unclean Hands.

In its Answer to the Third Consolidated Complaint, Starbucks raised three equitable defenses—waiver, estoppel, and unclean hands—all of which prohibit the finding of any refusal to bargain here. (GC Ex. 52 at 25, ¶ 24).

Importantly, the Charging Party's 8(a)(5) charge is waived by its subsequent participation in the election held on April 8. (Joint Ex. 1). With respect to waiver and estoppel, case law provides parties may not relitigate in subsequent 8(a)(5) refusal-to-bargain unfair labor practice proceedings issues that could have been litigated in a prior representation proceeding. *See, e.g., La Mirada Imaging*, 368 NLRB No. 89, slip op. at 1 n.3 (2019), *enfd. sub nom. RadNet Mgmt, Inc. v. NLRB*, 992 F.3d 1114, 1128 (D.C. Cir. 2021); *Nursing Ctr. at Vineland*, 318 NLRB 901, 905 (1995). General Counsel cannot rely upon evidence of a demand for recognition that predated the filing of the petition in this proceeding to establish the existence and validity of such a demand where the parties have subsequently entered into a valid and binding Stipulated Election Agreement waiving such challenges and agreeing to an election. *Cf. FedEx Freight, Inc.*, 362 NLRB No. 74, slip op. at 1 n. 1 (2015), *enfd.* 816 F.3d 515 (8th Cir. 2016); *see also Kaweah Manor*, 367 NLRB No. 22 (2018).

Additionally, these allegations are barred by the doctrine of unclean hands. The ALJ Bench Book recognizes that "***[o]rdinarily***, a charging party's own alleged misconduct is . . . not a defense to a respondent's unfair labor practices." ALJ Bench Book § 3-810. However, it also recognizes alleged charging party misconduct ***is relevant*** to the remedy, specifically citing cases where such evidence was considered when determining a bargaining order is appropriate. *Id.* (citing *Laura Modes Co.*, 144 NLRB 1592, 1596 (1963); *Allou Distributors*, 201 NLRB 47, 47–48 (1973) (union misconduct warranted withholding the normal bargaining order and instead directing an election)). Therefore, discussion of the union's misconduct—as evidenced in the record of this case—is appropriate. *Compare Cascade Corp.*, 192 NLRB 533 n. 2 (1971) (distinguishing *Laura Modes* and issuing a bargaining order where a valid election was conducted and a certification had issued before any misconduct took place), *enf. denied on other grounds* 466 F.2d 748 (6th Cir. 1972); *with Maywood Plant of Grede Plastics*, 235 NLRB 363, 365–366 (1978) (provocation must be weighed), *enfd. as modified* 628 F.2d 1 (D.C. Cir. 1980).

Contrary to the Union's objections, evidence of its misconduct during the election, *is relevant* to the remedy sought here and therefore is relevant to the issues before the judge. (Tr. 1069-70). Notably, Counsel for General Counsel voiced no objection to the line of questioning. All the objections came from Union counsel, whose own misconduct lies at the heart of the Company's objections to the conduct of this election.

Where, as here, the Union's misconduct could affect the unfair labor practice findings, an affirmatively pleaded defense regarding the misconduct must be heard. ALJ Bench Book § 3-810; *see also Chicago Tribune Co.*, 304 NLRB 259, 259-61 (1991) (respondent employer in 8(a)(5) bad-faith bargaining case could raise the union's bad faith bargaining as an affirmative defense,

even though the employer's previous 8(b)(3) charges regarding the union's conduct had been dismissed by the General Counsel or withdrawn by the employer).

Here, the Union inappropriately restrained and coerced employees in the exercise of their Section 7 rights by colluding with Board personnel in Region 14 by arranging for secret in person voting for hand-picked members of the bargaining unit behind the back of all other eligible partners as well as the Company, thereby creating the impression the Board endorsed and supported the Union. These facts are the subject of pending objections, which Starbucks was prejudicially denied the opportunity to consolidate with this proceeding, as well as pending unfair labor practices against the Union. *See* Case Nos. 14-CB-303498, 14-CB-303499. Failure to permit the introduction of such evidence to make a complete record in this case, including the inappropriate denial of the employer's subpoenas seeking probative evidence of the misconduct and collusion of the Union and Region 14, constitutes a blatant denial of due process. (*See* Resp. Exs. 83-86). *See Better Monkey Grip Co.*, 113 NLRB 938, 940 (1955) (trial examiner improperly "cut off lines of inquiry and limited the response of witnesses to such an extent that the development of the case may have been hampered"); *Boetticher & Kellogg Co.*, 137 NLRB 1392 n. 1, 1398-99 (1962) (trial examiner improperly barred respondent from cross-examining a General Counsel witness because respondent refused his direction to conduct cross examination before the charging party union had questioned the witness).

2. General Counsel's Intentional Delay in Pursuing a Bargaining Order Constitutes Impermissible Vexatious Litigation and a Denial of Due Process.

General Counsel intentionally delayed in the filing of the Third Consolidated Complaint seeking bargaining order remedies to prejudice Starbucks in its defense of those issues. *See, e.g.*, *Johansen v. Orange County Dist. Council*, No. 77-CV-0994-RF, 95 LRRM 3275, at *8 (C.D. Cal.

1977) ("In any event, the delay of six months is certainly a factor to be considered in determining whether issuance of an injunction would be proper."); *Danielson v. Electrical Workers (IBEW) Local 501*, 509 F.2d 1371 (2d Cir. 1975) (finding injunctive relief was unwarranted where the Board failed to seek expedited review of the district court's denial of injunction, which recognized that no real danger of irreparable harm existed to the public interest until the Board adjudicated the underlying unfair labor practice).

Indeed, in *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 33 (D.C. Cir. 2017), *denying enf. in relevant part of* 364 NLRB No. 93, slip op. at 1 n. 1 (2016), the court reversed the Board and found General Counsel's mid-trial motion to amend the complaint came too late because General Counsel had access to all of the relevant information necessary to investigate the charge for a full year before the hearing, provided no valid excuse for failing to include the charge in the initial complaint, and did not make the motion to amend until after the company had finished cross-examining General Counsel's key witness. The same logic applies here. The facts supporting the addition of the 8(a)(5) charge were well known to General Counsel long before the filing of any of the Complaints. However, to prevent the consolidation of the pending Objections hearing with this case As a way of precluding consideration of the Union's misconduct in this case, General Counsel intentionally delayed in adding to this case the allegations set forth in 14-CA-291665 until less than two weeks before the scheduled start date of the hearing. Then, General Counsel ignored Starbucks' timely and appropriately filed Motions to Transfer and Consolidate such proceedings. (Resp. Ex. 86). As such, the intentional delay constitutes both a denial of due process and affirmative evidence of General Counsel's vexatious litigation in this case. *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 33 (D.C. Cir. 2017), *denying enf. in relevant part of* 364 NLRB No. 93, slip op. at 1 n. 1 (2016).

3. After-Acquired Evidence

It also bears mentioning Doran continued to have unverified deposits up until her last closing shift on April 4. (Tr. 1514; Resp. Ex. 23 at 7). Accordingly, Starbucks has a properly preserved after-acquired evidence affirmative defense relating to Doran's continued cash handling negligence. If, *arguendo*, there was any deficiency in Starbucks' position that its discharge of Doran was lawful, this after-acquired evidence of subsequent and continuing unverified deposits through Doran's last day of work provides additional support for her discharge.

E. A Bargaining Order Is Inappropriate and Not Warranted on These Facts

As explained at length above, Starbucks defends any alleged refusal to recognize the Union on the grounds that no proper demand for recognition was made, it expeditiously moved for an election upon the filing of the Union's representation petition, and it had a good-faith doubt of the Union's majority status. Starbucks points out correctly that the burden of proof in showing a lack of good faith is upon General Counsel. *In re Orchard Corp. of America*, 170 NLRB 1297, 1305 (1968). Indeed, the record is uncontradicted regarding Starbucks's efforts to expedite, rather than delay, an election here as it agreed, in good faith, to forego its statutory right to a representation hearing on the appropriate unit despite having ample good faith reasons justifying its position, as set forth in its Statement of Position. (Resp. Ex. 82).

The ALJ Bench Book recognizes "***[o]rdinarily***, a charging party's own alleged misconduct is . . . not a defense to a respondent's unfair labor practices." ALJ Bench Book § 3-810. However, it also recognizes alleged charging party misconduct ***is relevant*** to the remedy, specifically citing cases where such evidence was considered when determining whether a bargaining order was appropriate. *Id.* (citing *Laura Modes Co.*, 144 NLRB 1592, 1596 (1963); *Allou Distributors*, 201 NLRB 47, 47–48 (1973) (union misconduct warranted withholding the normal bargaining order

and instead directing an election)). Therefore, discussion of the union's misconduct—as evidenced in the record of this case and in process of development in the Objections hearing that is in abeyance—is appropriate. *Compare Cascade Corp.*, 192 NLRB 533 n. 2 (1971) (distinguishing *Laura Modes* and issuing a bargaining order where a valid election was conducted and a certification had issued before any misconduct took place), *enf. denied on other grounds* 466 F.2d 748 (6th Cir. 1972); *with Maywood Plant of Grede Plastics*, 235 NLRB 363, 365–366 (1978) (provocation must be weighed), *enfd. as modified* 628 F.2d 1 (D.C. Cir. 1980).

VI. CONCLUSION

In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680-81 (1982), the Supreme Court stated the Act "is not intended to serve either party's individual interest, but to foster ***in a neutral manner*** a system in which the conflict between these interests may be resolved" (emphasis added). Starbucks respects the rights of its partners to decide for themselves whether they wish to be represented by a union pursuant to Section 7 of the Act. But those rights can only be properly exercised—and realized—through a neutral, honest process overseen by the Board consistent with the Act and legal precedent. The credible record evidence shows there is no merit to *any* of the unfair labor practices alleged in this case. Therefore, all the allegations in the Complaint must be dismissed in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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